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CAN YOU HEAR ME NOW?—CORPORATE CENSORSHIP AND ITS TROUBLING IMPLICATIONS FOR THE FIRST AMENDMENT

William A. Wines & Terence J. Lau¹

“[M]oney doesn’t talk, it swears.”

—Bob Dylan²

“The problem of power is . . . how to get men of power to live for the public rather than off the public.”

—Robert F. Kennedy³

“[A] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .”

—Justice William Brennan⁴

INTRODUCTION

The “profound national commitment” to “debate on public issues” that Justice Brennan lovingly described in 1964 has recently been forced on life support.⁵ Take, for example, Bill Maher’s talk show, *Politically Incorrect*, which appeared for a few years on the ABC network. His show was cancelled by ABC in the summer of 2002⁶ when several advertisers pulled out after Mr. Maher’s comments about Sep-

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2. BOB DYLAN, *It’s Alright, Ma (I’m Only Bleeding)*, on BRINGING IT ALL BACK HOME (Sony Records 1965). The entire stanza in which the quoted line appears is:

Old lady judges watch people in pairs
Limited in sex, they dare
To push fake morals, insult and stare
While *money doesn’t talk, it swears*
Obscenity, who really cares
Propaganda, all is phony.

Id. (emphasis added).

3. JAMES L. FISHER, *POWER OF THE PRESIDENCY* 27 (1984) (quoting Robert F. Kennedy).

4. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Justice Brennan further described protected speech as “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.*

5. *Id.*

6. See Roger Catlin, *Maher Moves Into ‘Real Time’ on HBO*, HARTFORD COURANT, Feb. 21, 2003, available at www.lexisnexis.com.

tember 11, 2001 drew criticism from the White House.⁷ Apparently, the White House indirectly achieved a goal (the silencing of a political critic)⁸ which it was constitutionally prohibited from accomplishing directly. For those who love free expression, such conduct invites scrutiny, whether or not one agrees with Mr. Maher's views.⁹

This silencing of critics appears to be widespread if one looks to corporate conduct.¹⁰ In a very real sense, the institution of law has become an accessory. Consider, for example, the use of SLAPP suits by large corporations to silence critics.¹¹ SLAPP is an acronym for "strategic lawsuits against public participation."¹² In addition to silencing critics, a popular fashion is to restrict the flow of information to the American people, or certain segments of the American people, in order to modify their behavior or to conform their opinions. This "screening of information" is insidious and undermines what it means to be a free people in the democratic sense.¹³ Much of the screening and silencing, although certainly not all, is a product of the abuse of vast economic powers by wealthy interests.

Since September 11, 2001, several federal government officials have used the tragic events of that day and our increased fear of international terrorism as a shield to protect themselves from criticism¹⁴ and to chill open discussion of the causes for the losses incurred on Sep-

7. Frank Rich, *Après Janet, A Deluge*, N.Y. TIMES, Mar. 21, 2004, available at 2004 WLNR 5387780.

8. Mr. Maher was not permanently silenced. He returned to television, albeit not network television, with a new show on HBO entitled *Real Time With Bill Maher* on Friday, February 21, 2003 at an 11:00 p.m. time slot. *See id.*

9. The nature of Mr. Maher's views may be suggested by the title of his recent book, *When You Ride Alone You Ride With Bin Laden*, a collection of his thoughts about the war on terrorism. *See Catlin, supra* note 6.

10. *See, e.g.*, discussion *infra* Part I.E.

11. RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 158-92 (1996).

12. *Id.* at 162-63.

13. The Supreme Court has cast a suspicious eye on governmental attempts to screen information prior to publication. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (upholding the right of the press to publish information of great public importance even when the information is stolen). *But see* *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003). In upholding the constitutionality of the Children's Internet Protection Act (which required public libraries to install software to filter or block obscene or pornographic computer images and to prevent minors from accessing material that was deemed harmful to them), the Supreme Court dismissed the argument that the law was a prior restraint on adult speech, holding instead that the library's decision to use filtering software was a collection decision. *See id.* at 209 n.4.

14. Consider, for example, White House press spokesman Ari Fleischer's exhortation to Americans to "watch what they say, watch what they do." Celestine Bohlen, *In New War on Terrorism, Words are Weapons, Too*, N.Y. TIMES, Sept. 29, 2001, at A11.

tember 11.¹⁵ This psychological chilling of open expression was also accelerated by the Bush Administration's decision to invade Iraq for the stated goals of ousting Saddam Hussein's regime and destroying weapons of mass destruction.¹⁶ Some reports on cable news suggest that Peter Arnett's job at CBS was "collateral damage" of a head-hunting mission by the White House after he criticized the U.S. war plan on Iraqi television.¹⁷ Even the absolute right of a client to communicate with his attorney was unilaterally suspended by the Attorney General in the days following September 11.¹⁸ The result has been disheartening to those who cherish open and robust discussion of matters of public import.

Globally, there seems to be decreasing tolerance for diverse and critical opinions. The daytime murder on a public street in Amsterdam, Holland, of Theo Van Gogh, the great grandson of the world-renowned Dutch artist anecdotally demonstrates this trend.¹⁹ Van Gogh, a filmmaker, received death threats after the August airing of the movie *Submission*, which told the fictional story of a Muslim woman forced into a violent marriage, raped by a relative, and brutally punished for adultery.²⁰ Van Gogh and a right-wing Dutch politician, who had renounced the Islamic faith of her birth, made the film.²¹ Witnesses said the attacker fired six shots, stabbed Van Gogh, and then stood over him to make sure he was dead.²²

If the outrageous act turns out to be what it appears—namely the killing of one man by another for the opinions he expressed—it is reminiscent of the response to the publication of *The Satanic Verses* by Salman Rushdie in 1988.²³ Rushdie's book prompted protests and

15. For further discussion on the aftermath of the September 11 attacks and its effects on the First Amendment, see John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1096 (2002).

16. Rather than stopping at discouraging open dissent, the government has even gone so far as to produce fictitious news reports about how well the government is doing in areas such as airport security and bringing democracy to Iraq. The reports were broadcast as regular news segments without being identified as government-produced video. See David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1.

17. See David Usborne, *The Iraq Conflict: NBC Sacks Veteran War Reporter Over Iraqi TV Interview*, INDEP., Apr. 1, 2003, available at www.lexisnexis.com.

18. See Andrew P. Napolitano, *No Defense*, N.Y. TIMES, Feb. 17, 2005, at A29.

19. Glenn Frankel, *Controversial Dutch Filmmaker is Slain; Van Gogh Angered Muslims with Criticism*, WASH. POST, Nov. 3, 2004, at A4.

20. *Id.*

21. *Id.*

22. *Id.*

23. See Barton Gellman, *Rushdie Case Termed 'Finished'; Iran's President Discusses Author's Death Sentence, Talks with U.S.*, WASH. POST, Sept. 22, 1998, at A21.

book burnings.²⁴ Iran's Ayatollah Khomeini proclaimed the book a work of blasphemy and condemned Rushdie to death for insulting Islam.²⁵ Eager followers of the Ayatollah put a bounty on Rushdie's head.²⁶ Perhaps, looking at just these two cases from many, it is possible that the global rise of fundamentalism among the world's major religions has led to an alarming certainty that allows people to condemn expression they disapprove of and even to kill others simply for not agreeing with them.²⁷

Rather than a "rights" analysis, we shall attempt to analyze this problem from the perspective of a public good. Previous scholarship has examined the nature of the First Amendment and the public good,²⁸ analogized speech on the Internet with public good and international trade theory,²⁹ and argued the harm in extending First Amendment protections to advertising.³⁰ In 1993, University of Chicago law professor Cass Sunstein argued for the creation of a Madisonian "deliberative democracy" and suggested that government should control the quality of information to ensure "greater diversity of view."³¹ Our inquiry is narrower than Professor Sunstein's, as our focus is on corporate forms of censorship. We concur with Professor Sunstein's argument on the importance of diversity of view, and this Article confirms the effects of a permissive regulatory scheme that allows *corporations* to dictate what we see and hear. We will also propose initiating a national debate on potential solutions.

In our discussion, we begin in Section II by reviewing the history of the First Amendment to support our contention that the First Amendment was and is intended to provide a "power-balancing"³² that pro-

24. *Id.*

25. *Id.*

26. *Id.*

27. See KAREN ARMSTRONG, *THE BATTLE FOR GOD*, at xi-xvii (2001).

28. See, e.g., Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991). But see R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993).

29. See, e.g., Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789 (2000).

30. See Tamara R. Piety, "Merchants of Discontent": *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377 (2001).

31. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 20-23 (1993). For a criticism of Sunstein's theories, see Richard J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is it an "Un-American" Theory of Speech?*, 85 KY. L.J. 97 (1996-1997).

32. For an interesting parallel discussion on power-balancing in the context of labor relations, see James B. Zimarowski, *A Primer on Power Balancing Under the National Labor Relations Act*, 23 U. MICH. J.L. REFORM 47 (1989).

fects unpopular political speech. Initially, the entire Bill of Rights was seen as a necessary tool to protect essential freedoms after the creation of a newer and stronger central government.³³ In this history, we see a mandate for power balancing to protect the expression of unpopular political sentiments from being silenced by powerful forces that may or may not have popular support. In Section III we provide illustrative cases of corporate censorship. We start with the repression of commercial messages during the 2002 Winter Olympic Games in Salt Lake City, Utah, then move to the startling case of a Boise, Idaho corporation's chilling of academic speech, and end with the use of corporate power to manipulate what was heard and seen during the 2004 presidential election. Section IV examines the expansion of civil rights obligations from the public sector to the private sector, and how the rise of corporate power in determining what broad swaths of the American public can see and hear coincides with the demise of the Federal Communication Commission's (FCC) monitoring of the publicly owned spectrum for "equal access." Finally, in Section V we make suggestions about potential solutions such as reinstating the equal time rule, breaking up ownership of media conglomerates under the antitrust laws, and allowing private attorney general actions to be brought by citizens who have been denied access to the essential public good of open and free expression on matters of public interest.

II. BRIEF HISTORY OF FREE EXPRESSION

A. *The U.S. Constitution (1787) and the Bill of Rights (1791)*

On December 15, 1791, Virginia became the eleventh state to ratify the first ten amendments to the U.S. Constitution and thus, the Bill of Rights became law.³⁴ As one commentator has noted, "In most states, Federalist proponents of the Constitution succeeded in securing ratification *only* by promising that they would seek a bill of rights when the new Congress convened after ratification."³⁵ The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to as-

33. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 302-05 (1966).

34. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 319 n.1 (1965).

35. JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION* 76 (1992) (emphasis added).

semble, and to petition the Government for a redress of grievances.³⁶

After the Civil War (1861–1865), Congress passed, and the states ratified, the Fourteenth Amendment, which addressed the civil rights of former slaves and other matters required as a result of the rebellion. In § 1, the Fourteenth Amendment declares:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁷

This Amendment took effect during Reconstruction and spoke directly to the states. The Bill of Rights, on the other hand, addressed the new federal government, not the states.

During the struggle by the courts to come to terms with the meaning of “due process” when applied to the state governments, the federal courts gradually embraced³⁸ the idea of selective incorporation.³⁹ Under that doctrine, the First Amendment protections were applied on a case-by-case basis. Freedom of speech has been protected against state encroachments since 1927.⁴⁰ Today, an important issue is how we can protect freedom of speech, or the larger concept of freedom of expression, against the powers applied by powerful economic forces, by the dominant culture, and—in time of war—by indirect government action through powerful “friends” rather than direct government intervention.

Our interest here is limited to nongovernmental obstacles to freedom of expression. Consequently, we will not venture into what the federal and state governments may do to limit free expression during

36. U.S. CONST. amend. I.

37. U.S. CONST. amend. XIV, § 1.

38. In 1892, the first Justice John M. Harlan insisted that the Fourteenth Amendment prohibited the states from abridging any of the fundamental rights guaranteed by the Constitution. *O’Neil v. Vermont*, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting). In other words, the Fourteenth Amendment “incorporates” the provisions of the Bill of Rights.

39. The Court “incorporated” or absorbed the First Amendment into the Fourteenth Amendment in *Fiske v. Kansas*, 274 U.S. 380 (1927). The Court had previously indicated its intent to move in that direction by dictum in *Gillow v. New York*, 268 U.S. 652 (1925). For an excellent authoritative summary of the selective incorporation doctrine, see LIEBERMAN, *supra* note 35, at 257–60.

40. *See id.*

times of national security crises other than to note that important issues lie in that realm.⁴¹

B. Free Expression and the Nature of a Public Good

The First Amendment protects both freedom of the press and freedom of speech. By 1921,⁴² some on the Supreme Court came to see this protection as including "freedom of expression," probably a larger concept than the combination of free speech and a free press, each considered separately.⁴³ The cases cited by Professor Reed clearly state, however, what is being protected is "communication."⁴⁴ Communication can be understood as the transmission of information in a manner in which the information is satisfactorily received.⁴⁵ Thus, communication requires both a sender of signals and a receiver of signals.

In other cases, the U.S. Supreme Court has held that the First Amendment protects the "right" to receive information as well as the right to transmit information. In examining the FCC's traditional "fairness doctrine," writing for the Court, Justice White declared, "It is the right of the public to *receive* suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."⁴⁶ Justice White explained that this right to receive ideas and experiences may not be constitutionally abridged by Congress or the FCC.⁴⁷ We believe that this "crucial"⁴⁸ right of the public to receive

41. The modern law of free speech is usually said to trace from Justice Oliver W. Holmes's famous dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919). This history should be expanded to include the much less heralded opinion of Judge Learned Hand in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). For an excellent and detailed explanation of why *Masses* is a better start to modern First Amendment history, see Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 719-72 (1975).

42. See *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting).

43. See O. Lee Reed, *Should the First Amendment Protect Joe Camel? Toward an Understanding of Constitutional "Expression"*, 32 AM. BUS. L.J. 311 (1995) (giving an excellent documentation of the history of the evolution of "expression" in First Amendment cases and reviewing nonverbal expressive conduct cases).

44. Justice Black (joined by Justice Harlan) wrote in dissent: "The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated." *Brown v. Louisiana*, 383 U.S. 131, 166 (1966). *Brown* involved a consolidation of sit-in cases from Louisiana. The Supreme Court overruled the convictions of the defendants for civil-rights sit-ins at public places to protest de jure segregation laws on the ground that the defendants' conduct was protected by the First Amendment.

45. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 232-33 (10th ed. 1995) (defining "communicate").

46. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added).

47. *Id.*

information should not be stymied by nongovernmental interests in situations where the government itself could not block the transmission or expression of that information.

Several studies suggest that we, the general public, tend to both underestimate the value of public goods and our fair share required to maintain them.⁴⁹ Another problem with public goods is that no one, in general, takes the role of caregiver for the public good. In one sense, public goods are orphans compared to private goods that “belong” to certain people who generally take an interest in their care and feeding, so to speak. One result of this, as shown in business ethics studies, is that public goods tend to suffer,⁵⁰ using a bank account analogy, from excessive withdrawals and inadequate deposits. For instance, most employers want to get full references from former employers for prospective employees but only a small fraction of them are willing to provide such references out of distrust and fear of litigation.⁵¹

48. *Id.*

49. See, e.g., ROBERT MITCHELL & RICHARD CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 46 (1989).

50. Theoretical research in social psychology confirms the presence of bias in estimating the value of public goods. Insensitivity to quantity, for instance, in valuation of public goods arises in three ways. First, the regular embedding effect in which willingness to pay (WTP) for a good is smaller if assessed after a superordinate good. A superordinate good in this context is not only a “higher order” good but also one that is seen as including a lesser good. Thus, WTP for protecting as wilderness an entire mountain range would include several watersheds or drainages. However, if asked for WTP just for one of the watersheds—after having stated WTP for the entire mountain range—people will usually drastically undervalue the drainage by itself. Some studies have obtained WTPs for an embedded good that were one-three-hundredths of WTP for the same good in isolation. Second, the quantity effect or the relative insensitivity to numerical quantity. Third, the adding-up effect in which the WTP for two goods is less than inferred from WTP for each good alone. Jonathan Baron & Joshua Greene, *Determinants of Insensitivity to Quantity in Valuation of Public Goods: Contribution, Warm Glow, Budget Constraints, Availability, and Prominence*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 107 (1996). Professor Baron, on the faculty of the Psychology Department at University of Pennsylvania, also argues that the “solution [to valuation biases for public decisions] should be a high priority for research.” Jonathan Baron, *Biases in the Quantitative Measurement of Values for Public Decisions*, 122 PSYCHOL. BULL. 72 (1997). All the biases identified have a tendency to undervalue the public good. From an economic perspective, public goods historically have had no value; hence, the effects of the externalities (pollution of air, water, and land) do not show as costs either to the producer or to the consumer of goods and services. As one textbook stated succinctly, “Traditionally, business has considered the environment to be a free, virtually limitless good. In other words, air, water, land, and other natural resources from coal to beavers . . . were seen as available for business to use as it saw fit.” WILLIAM H. SHAW & VINCENT BARRY, MORAL ISSUES IN BUSINESS 443 (1989). See also FREDERICK D. STURDIVANT, BUSINESS AND SOCIETY: A MANAGERIAL APPROACH 313–36 (1981) (discussing the difficulties involved in valuing and determining who pays for environmental public goods, including both maintenance and cleaning).

51. A 1998 survey conducted for the Society of Human Resource Management found that eighty to ninety percent of the respondents regularly conducted reference checks but that less

"Free expression" is a valuable public good. The Founders protected free speech against federal intrusion because they had just finished a very distasteful experience with England and King George III. Criticism of His Majesty's government, true or not, was grounds for serious punishment under the doctrine of seditious libel.⁵² It was not private conversations that needed protection, but public discourse, such as that provided by newspaper owner John Peter Zenger of New York in 1735.⁵³ This public discourse, especially on political topics, needed and received protection under the First Amendment. Both the right to hear and the right to speak were defended.⁵⁴ A free people need a free flow of information. This may be understood as "communitarian," but it does not have to be. It can also be understood as part of the social contract—I will respect your right to speak, write, hear, read, publish and watch whatever you wish if you will respect my right to do the same.

III. CORPORATE CENSORSHIP—ILLUSTRATIVE EXAMPLES

In order to illustrate the problems posed by nongovernmental obstacles to the First Amendment's dream of an informed populace engaged in vigorous debate, we examine in this section several examples of corporate censorship. We begin with the case involving a locally brewed beer in Utah and the marketing campaign used to sell that beer during the 2002 Winter Olympic Games. We then examine the case involving one of this Article's authors and Boise Cascade's chilling of academic speech. We mention briefly the allegations contained in a lawsuit by two fired reporters in Florida about Monsanto's pressure on a local Fox News affiliate to change an investigative news

than half of them (42%) provided an answer to the question of whether the former employee was eligible for rehire. *Survey Reveals Applicants Stray From Truth*, Personnel Policy Service, Inc., at <http://www.ppspublishers.com/articles/survey.htm> (last visited May 23, 2005). The same survey found that employers were even more tight-lipped about: job qualifications (18%), work habits (13%), people skills (11%), and violent or bizarre behavior (8%). *Id.* This refusal by former employers to comment on a particular employee's past job behavior has been such a contentious issue that some states have passed specific statutes dealing with the issue. For instance, North Dakota passed a statute granting immunity from civil liability for employers who provide truthful information regarding dates of employment, pay level, job duties, and job performance. N.D. CENT. CODE § 34-02-18 (2004). In neighboring Minnesota, the state supreme court granted relief to former employees who were fired on the pretext of "gross insubordination" because they were "compelled to publish" defamatory information when asked by prospective employers about the reasons for leaving their prior jobs. *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 888 (Minn. 1986).

52. See CHRISTOPHER HIBBERT, *GEORGE III: A PERSONAL HISTORY* 134 (1998).

53. For a recount of the trial of John Peter Zenger for seditious libel and jury nullification, see PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 5 (1999).

54. For further discussion on the "right to hear," see *infra* Part III.E.4.

story regarding the harmful effects of one of Monsanto's growth hormone products. Finally, we examine numerous incidents of corporate censorship surrounding the 2004 presidential election.

A. Polygamy Porter

One of the big hits of the 2002 Winter Olympic Games in Salt Lake City was a locally produced beer named "Polygamy Porter." This part of the paper discusses how that brand name became so popular not in the context of marketing, but in business, government, and society. As part of this work, we will produce a short history of the Schirf Brewing Company. We are interested in seeing how, in this narrow context, a business interacted with its larger community and how the market for a product worked (or from some people's perspective did not work). We are also interested in raising the issue of community and corporate censorship or "filtering" of free and protected speech in American society.⁵⁵

Raised Roman Catholic in Milwaukee, Wisconsin, Greg Schirf went west to Park City, Utah in 1983.⁵⁶ He decided that Utah, a heavily Mormon state, needed a brewery.⁵⁷ The Mormon Church, an informal name for the Church of Jesus Christ of Latter-day Saints (LDS Church), frowns on caffeine and is firmly against the use of alcohol or tobacco by any of its members. Thus, it seemed to some observers that Schirf's entrepreneurial quest might have been quixotic, or, at least, misplaced.

By 1986, Schirf was able to launch his award-winning brand of beer, Wasatch beers. Wasatch adopted the motto: "We Drink Our Share . . . And Sell The Rest."⁵⁸ Schirf named some of his beers after "the majestic mountains that provide the pure, natural water."⁵⁹ According to the company's website, "The Wasatch Brew Pub has housed the Schirf Brewing Company, brewers of the new Polygamy Porter, and Park City's most popular restaurant since 1989."⁶⁰

55. Commercial speech, although low on the priority list of protected speech, has enjoyed First Amendment protection since the United States Supreme Court decision in *First National Bank v. Bellotti*, 435 U.S. 765 (1978). In a more recent case, the Supreme Court held that Massachusetts regulations of outdoor advertising of smokeless tobacco were overbroad and violated both the First and Fourteenth Amendments. See *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001):

56. Steve Chawkins, *Utah Businesses Have Faith That Ads Shall Not Offend*, L.A. TIMES, Feb. 16, 2002, available at www.lexisnexis.com.

57. See John Ness, *Beer Man*, NEWSWEEK, Feb. 19, 2002, available at www.lexisnexis.com.

58. Wasatch Beers, at <http://www.wasatchbeers.com> (last visited May 24, 2005).

59. *Id.*

60. *Id.*

In March 2001, controversy began to swirl around some of Wasatch's advertising.⁶¹ One of the pieces of the attention-getting campaign urged billboard readers to "Baptize your taste buds" with Wasatch beer.⁶² Another ad featured a radio spot in which Elders "Rulon" and "Heber" endure door after door being slammed on them before Heber blurts out "Beer!" and reveals that their mission is of a different kind.⁶³ Heber says, "We're here to spread the word about good beer We're on a mission, sir."⁶⁴ These ads, according to the *Salt Lake Tribune*, offended some prominent Utah Mormons, including some legislators and beer distributors.⁶⁵

Greg Schirf says it is all meant in good fun.⁶⁶ "The campaign really isn't intended to give offense to the prevailing culture," he says.⁶⁷ "We just want to sell beer and have fun doing it."⁶⁸ People certainly took notice and talked about it. A March 2001 phone-in poll on a Mormon-owned radio station found forty-eight percent of the callers wanted the billboards taken down, but fifty-two percent thought the billboards should stay.⁶⁹ A spokesman for the LDS Church was reported in the *Tribune* as saying that the Church would have no official comment on the campaign.⁷⁰

Paul Kirwin of Park City, Utah's Kirwin Communications advertising agency took a rather sanguine approach to the controversy surrounding his company's recent pitch for Wasatch Beers. When asked about the potential for offending the state's overwhelming Mormon

61. Greg Burton, *Beer's Secret Ingredient? Controversy*, SALT LAKE TRIB., Feb. 18, 2002, available at www.lexisnexis.com.

62. *Id.*

63. Glen Warchol, *A Blessing or a Curse? Irreverent Beer Ads Brew Plenty of Both; Beer Ads Poke Fun at Local Culture*, SALT LAKE TRIB., Mar. 4, 2001, available at www.lexisnexis.com.

64. *Id.*

65. *Id.*

66. Malcolm Muggeridge, the British wit and former editor of *Punch* magazine, once said "Good taste and humor are a contradiction in terms, like a chaste whore." MARDY GROTHE, OXYMORONICA: PARADOXICAL WIT AND WISDOM FROM HISTORY'S GREATEST WORDSMITHS 17 (2004).

67. Warchol, *supra* note 63. According to most estimates, sixty to seventy percent of the Utah population list the Mormon Church as a religious preference. *Compare Utah Puts Pinch on Risky Brewery*, DURANGO TELEGRAPH, Apr. 17-23, 2003, available at http://www.durangotelegraph.com/03-04-17/mountain_exchange.htm (placing number at sixty percent), with *Microbrewer's Billboard Raises Hackles in Utah*, Modern Brewery Age, at http://www.findarti.cles.com/cf_dls/m3469/6_52/72346221/p1/article.jhtml (Feb. 5, 2001) (reporting that "[a]bout 70 percent of Utah residents are Mormon.").

68. Warchol, *supra* note 63.

69. *Id.*

70. *Id.*

population, Kirwin replied, "How can you lose a customer you'll never have?"⁷¹

Apparently the controversy about Wasatch Beers's advertising and the choice of names for its beers was just warming up as the opening day of the 2002 Winter Olympic Games drew near. Schirf Brewing Company produced a beer called "St. Provo Girl Pilsner" featuring an image of a buxom blonde.⁷² Next, Schirf came out with "2002 Unofficial Amber Ale."⁷³ This caused a dustup with the Olympic organizers.⁷⁴ The real storm came, however, when Wasatch introduced a new advertising campaign for its newest beer, Polygamy Porter.⁷⁵

The advertising campaign for Polygamy Porter included the slogan: "Why Have Just One?"⁷⁶ The play on words, suggesting both beer and wives should be consumed in the plural, yielded spectacular results. The beer was flying off the shelves and so were the T-shirts. With the story getting national and international news coverage, Wasatch Brewers's e-commerce sales—mainly Polygamy Porter T-shirts—increased from \$2,000 to \$50,000 a month.⁷⁷ The campaign included a billboard featuring the slogan: "When enjoying our flavorful beverages please procreate responsibly."⁷⁸

The Mormon Church outlawed polygamy in 1890.⁷⁹ This ban on polygamy was a condition of Utah's statehood. There remain pockets of practicing polygamists in parts of Utah.⁸⁰ There are an estimated 30,000 to 50,000 practicing polygamists in Utah, according to a survey by the *Salt Lake Tribune*.⁸¹ In fact, one of the outspoken critics of the beer was Owen Allred, the leader of one of Utah's largest polygamist sects, the Apostolic United Brethren. Mr. Allred said, "I sure don't like it, but I don't think there is anything I can do about it. We do not

71. *Id.*

72. Tom Kenworthy, *Beermaker Brews Up Wicked Sales Campaign*, USA TODAY, Feb. 22, 2002, at D10.

73. Candus Thomson, *Utah Beer's Flippancy Ads Land Brewmaster in the Suds; State Liquor Commission Censors Jokes; Billboard Companies Refuse Space*, BALTIMORE SUN, Nov. 9, 2001, available at 2001 WLNR 1061185.

74. *Id.* Schirf says, "I'll never understand that one. Which part did they have licensed? 2002? Unofficial?" *Id.*

75. *Id.*

76. Kenworthy, *supra* note 72 (internal quotation marks omitted).

77. *Id.*

78. Greg Burton, *Polygamy Parody Beer Ad Flap Comes to a Head in Utah*, SAN DIEGO UNION-TRIB., Nov. 16, 2001, available at 2001 WLNR 9534297.

79. Thomson, *supra* note 73.

80. *Id.*

81. Nancy Lofholm, *Olympic Brew-Haha Over Polygamy Comes to Head*, DENVER POST, Nov. 2, 2001, available at 2001 WLNR 553590.

believe in alcoholic drinks of any kind, it's definitely a slam against the polygamists."⁸²

Schirf and Wasatch Beers ran into serious opposition when the state alcoholic beverage control commission toyed with the idea of banning advertising that made fun of religion. Additionally, two local billboard companies refused to run the ad campaign for Polygamy Porter.⁸³ Civic leaders attempting to portray Salt Lake City as having a cosmopolitan flavor in order to attract Olympic visitors were upset with the ads dredging up an embarrassing part of Utah's history.⁸⁴ Despite having done previous campaigns for Wasatch beers, Reagan Outdoor Advertising Company refused to honor its contract to promote Polygamy Porter.⁸⁵ Reagan Advertising used the "bad taste" escape clause to get out of the contract, even though Mr. Schirf protested, "We've exhibited much worse taste than this."⁸⁶

Dewey Reagan of Reagan Outdoor Advertising said, "The entire ad is offensive."⁸⁷ Moreover, Mr. Reagan, whose company had contracted to erect the billboard that advised drinkers to "take some home for the wives" and "please procreate responsibly," maintained, "We just do not want to be associated in any way with anything that associates in any way with polygamy It's not something that is accepted by the majority of society."⁸⁸

Apparently, Reagan Outdoor Advertising had discovered a new sensitivity to advertising content that it lacked in years past. The *Salt Lake Tribune* reported that two years before, Reagan ran a Brighton Ski Resort billboard with the slogan, "Why be wedded to one resort?"—a not too subtle nod to Utah's polygamous history.⁸⁹ Brighton marketing director Dan Maelstrom said, "We have run boards at Reagan every year. Now it's getting a little weird."⁹⁰ Reagan also nixed a Brighton advertisement featuring free skiing for children ten years and younger. That slogan was "Bring'em Young"—a word play on the name of the LDS Church's second president and prophet, Brig-

82. Greg Burton, *Oh, My Heck! Beer Billboard Gets the Boot*, SALT LAKE TRIB., Nov. 6, 2001, available at www.lexisnexis.com.

83. Thomson, *supra* note 73.

84. *Id.*

85. Greg Burton, *Polygamy Beer Happily Wed to (Just 1) Billboard Firm*, SALT LAKE TRIB., Dec. 7, 2001, available at www.lexisnexis.com.

86. Burton, *supra* note 82.

87. *Id.*

88. *Id.*

89. Greg Burton, *Billboard Firm Puts Kibosh on a New Set of Ad Spoofs*, SALT LAKE TRIB., Nov. 7, 2001, available at www.lexisnexis.com.

90. *Id.*

ham Young, who had numerous wives.⁹¹ Schirf tried to get other companies to run the billboards for Polygamy Porter without success. Young Electric Sign Company, based in Salt Lake City, rejected the advertisement.⁹²

The president of the Salt Lake City Organizing Committee for the Olympics, Mitt Romney, and others, did a masterful job of selling Salt Lake City as a cosmopolitan city just waiting to be discovered by a world bamboozled by wrong-headed stereotypes. In fact, Mr. Romney, son of former Michigan governor George W. Romney,⁹³ did such a good job that it seemed to jump-start his political career in his home state of Massachusetts.⁹⁴ In some nearby towns such as Boise, Idaho, the media “spin” was so positive as to be almost saccharine.⁹⁵ No mention was made of any logistics problems, and virtually everywhere the major media outlets praised the Salt Lake City Olympics as possibly the best ever.

One example from many should provide the flavor. Delta Airlines operates a major hub in Salt Lake City. In its February 2002 issue of *Sky* magazine, Delta featured a cover article that ran ten-pages long with photos and quotations that praised Salt Lake City.⁹⁶ The author opened with this confession:

Salt Lake, I once thought, was just a big city with a small-town mind-set, strange liquor laws and a heavy-handed religion. As I met more locals over the years, I realized that I had mistaken the stereotype for the reality. On the eve of the 2002 Olympic Winter Games, I returned for a closer look and discovered warm people, civic dynamism, a unique history, an active cultural life and an enviable proximity to nature.⁹⁷

91. *Id.*

92. Lofholm, *supra* note 81.

93. George Wilchen Romney (1907–1995) was governor of Michigan from 1963–1969 and then Secretary of Housing and Urban Development from 1969–1973 under President Richard M. Nixon. Prior to his political career, he was a businessman and the president of American Motors Corporation. He also held numerous high posts in the Mormon Church. David Rosenbaum, *George Romney Dies at 88; A Leading G.O.P. Figure*, N.Y. TIMES, July 27, 1995, at D22.

94. In 1994, when Mitt Romney ran against Edward M. Kennedy for the United States Senate, Romney’s Mormon faith was an issue in the press. By contrast, in November 2002, when Romney was elected Governor of Massachusetts (where less than 0.5% of the residents are Mormons), his religion received fewer than half as many mentions in the media as it did in 1994. Michael Paulson, *Romney Win Seen as Sign of Acceptance of Mormons*, BOSTON GLOBE, Nov. 9, 2002, at B1.

95. See, e.g., Mike Prater, *Drama and Emotion, Successes and Failures*, IDAHO STATESMAN, Feb. 25, 2002, available at www.lexisnexis.com (calling the Winter Olympics the “best ever”).

96. Roger Toll, *The Soul of Salt Lake City*, SKY, Feb. 2002, at 46–55 (on file with the DePaul Law Review).

97. *Id.* at 48.

In the next paragraph, the author introduced Mitt Romney (elected Republican Governor of Massachusetts in 2002) and his views on Divine Providence's hand in the 2002 Olympic site:

"God did a good job here geographically," Salt Lake Organizing Committee of 2002 President and CEO Mitt Romney told me. "I was riding up to Park City the other day with Jean-Claude Killy," Romney said of their trip to the nearby ski-resort town, "and he [Killy] started shaking his head. 'What's the matter?' I asked. He said he'd never before seen an eight-lane expressway going to a ski village."⁹⁸

On the facing page in large type, the author quoted former Salt Lake City Mayor Ted Wilson, "The *Mormon Church* has given this community a strong spine: strong families, dedication to clean values, hard work."⁹⁹

The author concluded the article by stating: "[The author] always thought Salt Lake City was a nice place to visit. Now, he's tempted to move there."¹⁰⁰

One might think it would be newsworthy that a company like Schirf Brewing produced a product legally for sale and could not buy advertising space to promote it in the entire state of Utah in the first years of the twenty-first century. The story that was not newsworthy in the United States, however, "broke" in *The Economist* with some help from the British Broadcasting Company (BBC). Only then was it imported to the United States.¹⁰¹

Other subjects, including an examination of whether Mormon baptism is recognized by the Roman Catholic Church (it is not), were all grist for mainstream journalism's examination in the buildup to the 2002 Winter Olympics.¹⁰² One *Newsweek* article, for example, touched on Mormon church doctrine, history, beliefs about afterlife,

98. *Id.*

99. *Id.* at 49.

100. *Id.* at 55.

101. See *Utah's Holy War*, *ECONOMIST*, Oct. 27, 2001, at 33.

102. See Kenneth L. Woodward, *A Mormon Moment: America's Biggest Homegrown Religion is Looking More Christian*, *NEWSWEEK*, Sept. 10, 2001, at 44, 49. Ironically, the introduction of Polygamy Porter was raised in the following passage in a companion article in the same issue:

In July, the 10th Circuit Court of Appeals struck down a Utah provision that had banned most alcohol advertisements.

Salt Lake Mayor Rocky Anderson, looking to shake his hometown's provincial image, has led the effort to make the rules "more hospitable." Anderson, a divorcee and a Democrat, has been something of a lone voice in the wilderness. He won a battle against the city council to allow beer drinking in the park surrounding city hall, and he's now hoping to loosen a law that prohibits dancing till dawn. . . . Heck, Utahns [sic] even have a sense of humor. Wasatch Brewery has just introduced a new product in time for the Games: Polygamy Porter. It's being promoted with the slogans "Why have just one?" and "Take one home for the wives."

Joseph Smith's revelations and murder, the rise of Brigham Young, the controversial 1857 "Mountain Meadows" massacre, and the strict culture in Utah.¹⁰³ The tone of these articles, however, was almost jocular; a reader could come away from the issue thinking that the Olympics were going to cause a mild reformation in Utah's Mormon-dominated culture.

Newsweek touched on Wasatch Beer's launching of Polygamy Porter as an example of Utahans having a sense of humor.¹⁰⁴ Schirf Brewing Company's subsequent struggle to find any outdoor advertising company that would run its ad campaign, however, failed to get similar coverage. In fact, some Utahans did not have a sense of humor about polygamy at all.¹⁰⁵ Mainstream media, controlled by a handful of corporations,¹⁰⁶ did not find this revelation at all worthy of coverage or discussion.

The First Amendment to the U.S. Constitution, passed in 1791 and, in relevant part, declares that Congress shall "make no law . . . abridging the freedom of speech, or of the press"¹⁰⁷ For almost 190 years, the courts held that commercial speech enjoyed no protection under the First Amendment. Then, in a watershed case, a majority of the court, for the first time, recognized that some commercial speech was entitled to some protection, albeit "a lesser protection . . . than [that given] to other constitutionally guaranteed [forms of] expression."¹⁰⁸

Of course, no one can deny that the Winter Olympics were very big business.¹⁰⁹ Consequently, the sponsors and other businesses that stood to rake in millions of dollars would not only be sensitive to Salt Lake City's image but would also push hard to ensure that the media

Ana Figueroa, *Salt Lake's Big Jump: This Sober City is Getting Ready to Party*, *NEWSWEEK*, Sept. 10, 2001, at 53.

103. *Id.*

104. *Id.*

105. The Juab County Attorney and governor's brother, David Leavitt, is a descendent of a polygamist marriage. Holly Mullen, *Tough Prosecutor Seeks to Help Polygamist Green's Victims Rebuild Stolen Lives*, *SALT LAKE TRIB.*, Aug. 4, 2002, available at 2002 WLNR 5263277. Recently, Attorney Leavitt successfully prosecuted a prominent polygamist for child rape of his thirteen year-old bride. *Id.* The convicted polygamist, Tom Green, was sentenced to five years to life in prison for the first-degree felony. Kevin Cantera, *Polygamist Gets Five Years to Life*, *SALT LAKE TRIB.*, Aug. 28, 2002, available at 2002 WLNR 5590974.

106. See *infra* Part IV.C.

107. U.S. CONST. amend. I.

108. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

109. For example, the Dutch Olympic team paid \$180,000 to turn a suburban golf course country club near Park City into the Holland Heineken House. Anheuser-Busch, a fifty million dollar Olympic sponsor, paid an extra \$155,000 to lease the Park City-owned Gallivan Center to create a beer garden. Thomson, *supra* note 73.

spin was extraordinarily positive.¹¹⁰ Anheuser-Busch paid more than \$50 million to the Salt Lake City Organizing Committee and the U.S. Olympic Committee in exchange for the exclusive beer-promotion rights during the Winter 2002 Games for its signature brand, Budweiser.¹¹¹ This kind of full-court media push can be likened to what the media and Hollywood do when it is time to turn American opinion in favor of a war.¹¹² In this atmosphere, Wasatch Beer was a small fish swimming against a big current. Through good fortune and a huge amount of free media publicity, however, Wasatch beer did receive an unexpected windfall.¹¹³ However, such a result is not the most probable outcome. Wasatch Brewery, under existing law, would have been ill-advised to sue Reagan Outdoor Advertising for abridging its commercial speech rights. Under our tentative proposal, Wasatch Brewery—had it not been the beneficiary of a lucky break courtesy of the BBC—would have standing and a financial incentive to seek redress and to test the “good taste clause” against the First Amendment rights of consumers in a so-called free market for commercial information.

Since the Olympics, the State of Utah has moved to increase its tax on beer.¹¹⁴ One member of the Utah legislature said, on the floor of the house, that he was especially offended by Wasatch Brewery’s advertisements and thought that beer was a good place to find money for the state budget shortfall.¹¹⁵ In response, Greg Schirf, dressed as

110. To illustrate, on February 13, 2002, the *Denver Post* ran a column by sportswriter Woody Paige who stated: “Salt Lake City has royally screwed up the Olympics.” Woody Paige, *Colorado Real Winner of Games*, DENV. POST, Feb. 12, 2002, available at 2002 WLNR 460319. After a firestorm of reaction by Utahans, the newspaper editor said the article “should not have been published” and that it represented a “breakdown” in the editing system. Glenn Guzzo, *Paige Column Should Not Have Run*, DENV. POST, Feb. 17, 2002, available at 2002 WLNR 460207.

111. Jerry Spangler & Lisa Riley Roche, *This Bud’s For You, S.L.: Busch to Sponsor Games*, DESERET NEWS, Mar. 10, 1998, available at www.lexisnexis.com.

112. See, e.g., *THE AD AND THE EGO* (Parallax Pictures 1997); *THE LIFE AND TIMES OF ROSIE THE RIVETER* (Clarity Films 1980).

113. By the end of 2001, Greg Schirf, a forty-nine year old admitted former hippie, said that “because of the Winter Olympics, they [his opponents] don’t seem to realize they are drawing more attention to themselves. I couldn’t pay for this kind of publicity.” Thomson, *supra* note 73. Finally, Schirf, the so-called “life of the party,” could not resist one more zinger: “[T]he church has been so helpful, I should tithe 10 percent. It’s the only right thing to do.” *Id.* (internal quotation marks omitted).

114. The beer tax in Utah will rise from eleven dollars per barrel to \$12.80 per barrel as a result of a bill passed in the 2002–2003 legislative session. *States’ Budget Woes Mean Higher Beer Taxes*, L.A. TIMES, Apr. 6, 2003, available at www.lexisnexis.com.

115. Senate Majority Leader Michael Waddoups denied retribution, but promised to point out the billboard to any legislators who were on the fence about the tax increase. Referring to an ad for Wasatch beer featuring the “St. Provo Girl” bursting out of her bustier with the caption “Nice Cans!”, Waddoups told the *Salt Lake Tribune*, “It’s flat out bad taste.” Glen Warchol, *Suggestive Ad Campaign Could Result in Beer Tax Hike*, SALT LAKE TRIB., Dec. 11, 2002, availa-

Benjamin Franklin, protested in a fashion reminiscent of the Boston Tea Party by pouring the first few barrels of his First Amendment Amber into the Great Salt Lake.¹¹⁶ Schirf called the beer tax “brilliant” and compared it to the “Amish raising the tax on gasoline.”¹¹⁷

In a seemingly unrelated incident, a Utah couple took out billboard space to promote a book that proselytizes polygamy.¹¹⁸ The billboards show somber faces of polygamous Mormon pioneers surrounding the book’s title, *More than One: Plural Marriage—A Sacred Pioneer Heritage*.¹¹⁹ The book’s author, Shane Whelan, calls polygamy “A Promise for Tomorrow.”¹²⁰

Our interest in this is not one of censorship. One can, after all, advocate some far-out, even ridiculous ideas under the First Amendment. Rather, we note for the record that the billboard space was unavailable to Wasatch brewery when it wished to advertise a lawful product with the word “polygamy” in the product label. That ad was found “offensive,” but other billboards advocating an illegal practice that Mormon leaders have officially renounced were not found to give offense. This situation is ironic, aggravating, and a sad commentary on corporate America’s lack of commitment to good citizenship, fair play, and free expression.

B. Boise Cascade Company Chills Free Expression¹²¹

This part of our article will focus on Boise Cascade Company’s (BCC) actions in the fifteen years from approximately 1988 to 2003. During this period, BCC typified the behavior of transnational corporations in the extractions industry¹²² and that industry’s alleged gen-

ble at 2002 WLNR 5577861. Waddoups noted that by becoming the majority leader, he would have the “bully pulpit” to increase the beer tax. *Id.* More than ninety percent of legislators belong to the Mormon faith. *Beer Tax Protest: Utah Brewer Will Dump ‘1st Amendment Lager’ Into Great Salt Lake*, at <http://realbeer.com/news/articles/news-001879.php> (Mar. 31, 2003).

116. Rene Sanchez, *Entrepreneur Is at Lagerheads With Utah on Taxes*, WASH. POST, Apr. 6, 2003, at A2.

117. *Id.*

118. Christopher Smith, *LDS Couple’s Book Takes on Polygamy Shame*, SALT LAKE TRIB., July 15, 2002, available at 2002 WLNR 5385671.

119. *Id.*

120. *Id.*

121. In an attempt to “re-brand” its image, Boise Cascade shortened its name to “Boise” in 2002. Ken Dey, *‘Boise’ Lops ‘Cascade’ Off its Name; Company Says Change Reflects Current Direction*, IDAHO STATESMAN, Mar. 15, 2002, available at www.lexisnexis.com. However, many people who had known the company by its old name continue to use “Boise Cascade.”

122. Boise Cascade is no longer in the extraction industry after buying Office Max, a large office supply chain, for \$1.06 billion in December 2003. Jeff St. John, *Boise Cascade Sells Paper, Timber Assets*, TRI-CITY HERALD, July 28, 2004, available at 2004 WLNR 12372677. Then, in July 2004, BCC agreed to sell its paper and timberland assets to a Chicago-based buyout firm for

eral disregard for the environmental welfare of the planet.¹²³ This section details how BCC's expansion into Mexico became the subject of academic research, and how university administrators under pressure from BCC treated that research.

We note that one of this article's co-authors, William Wines, is a party to a settlement agreement resulting from litigation between himself, his co-authors, and the University of Denver, arising out of an article he wrote about BCC.¹²⁴ This section of the paper was written by co-author Terence Lau and is based on publicly available sources.

In the late nineties, BCC was faced with "thinning inventories, toughening environmental regulations, and dogged demonstrators."¹²⁵ After the North American Free Trade Agreement was ratified in 1994, BCC became one of fifteen U.S. wood-products companies to relocate operations to Mexico.¹²⁶ BCC closed mills in Joseph, Oregon in 1994 and Council, Idaho in 1995.¹²⁷ At the same time, BCC opened a new mill in Papanao, in the Mexican state of Guerrero.¹²⁸ A farmer-led protest of BCC's operations led to a massacre on June 28, 1995, when seventeen unarmed farmers were killed by police.¹²⁹ An attempted cover-up, which involved placing weapons in the hands of those killed, failed when unedited video of the massacre was aired on Mexican television.¹³⁰ A special prosecutor jailed twenty-eight police officers, and the governor of the state was forced to resign.¹³¹

\$3.7 billion and to change its name to OfficeMax, Inc., thereby completing its transition to the number three office-products retailer. *Id.* George Harad remained the Chief Executive. *Id.*

123. The battle between Boise Cascade and the environmental rights group Rainforest Action Network (RAN) over BCC's environmental policies was especially public in 2004. "The . . . company [BCC] accused the group [RAN] of using 'harassment and intimidation' to advance a 'lawless, radical agenda.'" Marc Gunther, *The Mosquito in the Tent: A Pesky Environmental Group Called the Rainforest Action Network is Getting Under the Skin of Corporate America*, FORTUNE, May 31, 2004, at 158. After RAN persuaded many of BCC's customers (including Kinko's, L.L. Bean, Patagonia, and the University of Texas) to stop buying from BCC, BCC relented and agreed to stop buying wood harvested from endangered forests. *Id.*

124. Wines v. Univ. of Denver, No. CIV-00-048-S-EJL (D. Idaho filed Aug. 31, 2000). See also Ken Dey, *Two BSU Professors Settle Retraction Suit; Article Criticized Boise Cascade on Human Rights*, IDAHO STATESMAN, Aug. 18, 2001, available at www.lexisnexis.com.

125. John Ross, *Treasures of the Costa Grande; U.S. Timber Companies Open Operations in Mexico*, SIERRA, July 1996, at 22.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Ross, *supra* note 125.

In April 1998, BCC ceased operations in Mexico.¹³² Company officials claimed the shutdown was the result of the rainy season and problems with infrastructure.¹³³ To the contrary, the *Chicago Tribune* reported that local peasant activists, led by Rodolfo Montiel and Teodoro Cabrera, organized trucking blockades that led to BCC's withdrawal.¹³⁴ Mexican Army officials arrested Montiel and Cabrera in 1999.¹³⁵ They were held incommunicado for five days in an army barracks where they were tortured.¹³⁶ They eventually signed statements confessing to gun running and illegally cultivating marijuana.¹³⁷ The men were convicted of those charges and sentenced to prison terms of seven to ten years.¹³⁸ During their time in prison, Amnesty International called them prisoners of conscience and Montiel was awarded the prestigious Goldman Prize for environmental activism.¹³⁹

Activist group American Lands Alliance tried to link BCC with the torture and jailing of Montiel in Mexico at the BCC shareholders' meeting in 2000.¹⁴⁰ Company chairman George Harad replied, "*You may want to think very carefully about connecting Boise Cascade in any way with the imprisonment of Mr. Montiel.*"¹⁴¹ When activists at the shareholder meeting credited Montiel with BCC's withdrawal from Mexico, Mr. Harad replied, "We had absolutely no knowledge of Mr. Montiel until we read about him in the newspapers."¹⁴²

In 2001, after spending more than two years in prison, Montiel and Cabrera were released from prison by Mexican president Vicente Fox.¹⁴³ In a statement described as "terse," President Fox said, "With this, we show by our actions, my government's commitment to the

132. John Tucker, *Boise Cascade Plan Draws Fire*, IDAHO STATESMAN, Apr. 21, 2000, available at www.lexisnexis.com.

133. *Id.*

134. Laurie Goering, *Mexico Frees Environmental Activists; Pardon by Fox Follows Slaying of Their Lawyer*, CHI. TRIB., Nov. 9, 2001, at N26.

135. *Id.*

136. During a speech to students at the University of South Florida in 2003, Montiel said he was choked, jumped on, electrically shocked, and had soda injected up his nostrils. Aya Batrawy, *Mexican Activist Shares Stories of Torture at U. South Florida*, U. WIRE, Apr. 15, 2003, available at www.lexisnexis.com. According to Montiel, he and Cabrera were forced to sign confessions to three charges and pose with illegal weapons, leading to their convictions on weapons charges. *Id.* Further, Montiel states that they were not permitted to communicate with family members for fifteen days after being arrested. *Id.*

137. Goering, *supra* note 134.

138. *Id.*

139. *Id.*

140. Tucker, *supra* note 132.

141. *Id.* (emphasis added).

142. *Id.*

143. Ginger Thompson, *Fighters for the Forests are Released From Mexican Jail*, N.Y. TIMES, Nov. 9, 2001, at A12.

promotion and observance of human rights in our country.”¹⁴⁴ In response to a question, the U.S. State Department spokesman stated that the United States “applaud[s] this important gesture and the strong reaffirmation of Mexico’s commitment to an improved human rights record it signals.”¹⁴⁵ Montiel and Cabrera’s release came shortly after their lawyer, Digna Ochoa, a prominent human rights lawyer and former nun, was found murdered.¹⁴⁶ Ms. Ochoa’s body was found with two bullet wounds, fired from point blank range, along with an anonymous note threatening further attacks against human rights activists.¹⁴⁷ Incredibly, in spite of the existence of two point blank bullet holes, the Mexican authorities investigating the case concluded that Ms. Ochoa’s death was a suicide.¹⁴⁸ The State Department, in its 2004 Annual Human Rights Report on Mexico, took exception to this conclusion, noting that the Mexico City human rights commission had reported that irregularities in the case did not “generate certainty.”¹⁴⁹ Prosecutors in Mexico City recently reopened the investigation into Ms. Ochoa’s death.¹⁵⁰

In September 1998, the *Denver Journal of International Law and Policy* published a scholarly article called *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico’s Costa Grande and Elsewhere*.¹⁵¹ The article was written by William Wines and Mark Buchanan, both professors from Boise State University, and Donald Smith, an environmental activist.¹⁵² As the article’s title suggests, the authors accused BCC of irresponsible corporate behavior in its Mexican operations.¹⁵³ In July 1999, and without first contacting the authors, the University of Denver “retracted” the article by publishing an “errata” in the summer 1999 issue of the *Denver*

144. *Id.*

145. Daily Press Briefing, U.S. Department of State, Mexico: Release of Environmental Human Rights Activists (Nov. 14, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/6127.htm> (answering the question “What is the U.S. opinion of the release of Mexican environmentalists Rodolfo Montiel and Teodoro Cabrera?”).

146. Ginger Thompson, *Rights Lawyer’s Odd Death Tests Mexican Justice*, N.Y. TIMES, June 3, 2002, at A3.

147. *Id.*

148. *Id.*

149. U.S. DEP’T OF STATE, MEXICO: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—2004 (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41767.htm>.

150. James McKinley, Jr., *Prosecutors in Mexico Reopen Inquiry in Rights Lawyer’s Death*, N.Y. TIMES, Feb. 27, 2005, at A8.

151. Peter Monaghan, *A Journal Article is Expunged and Its Authors Cry Foul*, CHRON. HIGHER EDUC., Dec. 8, 2000, at A14.

152. *Id.*

153. *Id.*

Journal of International Law and Policy.¹⁵⁴ The journal also instructed the Westlaw and Lexis-Nexis legal databases to remove the article from their electronic collections.¹⁵⁵ A search on Lexis now yields neither the article nor the errata, but other scholarly articles that cite to the original article are still available.¹⁵⁶

According to the errata, the article had been retracted because of its "lack of scholarship and false content."¹⁵⁷ The errata also claimed that the article was "not consistent with the editorial standards of the *Journal* or of the University of Denver, and that portions of the article relating to Boise Cascade were clearly inappropriate and required elimination, revision or correction."¹⁵⁸ The errata also apologized to "any individuals that were impacted [*sic*],"¹⁵⁹ and claimed that the withdrawal from Lexis and Westlaw occurred "pending re-editing."¹⁶⁰

While the University of Denver claims that it did not act under pressure from BCC in withdrawing the article, university officials admit that upset BCC officials contacted the university in October 1999.¹⁶¹ In a startling admission of acquiescing to corporate censorship, university lawyer Paul Chan responded to a journalist's question about whether the university was threatened with a lawsuit by Boise by answering, "Well, 'threaten' is an interesting word. Let's just say that they pointed out that the objections they raised did rise to the level of being actionable."¹⁶²

154. *Id.*

155. *Id.*

156. See, e.g., Vincent M. Di Lorenzo, *Legislative and Public Policy Debate: Should the Social Viewpoints of Religious Groups Play No Role?*, 1 MARGINS 489, app. (2001) (citing *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*); Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 53 n.34 (2002) (citing subject article); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 83 n.5 (Spring/Summer 1999) (citing subject article); Patricia Romano, Comment, *Sustainable Development: A Strategy That Reflects the Effects of Globalization on the International Power Structure*, 23 HOUS. J. INT'L L. 91, 93 n.4 (2000) (citing subject article). The retraction of this article from academic debate is mentioned in Daniel M. Warner, *An Essay on the Market as God: Law, Spirituality, and the Ecocrisis*, 6 RUTGERS J.L. & RELIGION 1, 28 n.115 (2004).

157. Monaghan, *supra* note 151.

158. *Id.*

159. *Id.* The use of the word "impact" as a verb presents a usage problem. Eighty-four percent of the Usage Panel of the American Heritage Dictionary disapproves of the construction "to impact on," while ninety-five percent disapproves of the use of the word "impact" as a transitive verb. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 878 (4th ed. 2000).

160. Monaghan, *supra* note 151.

161. *Id.*

162. *Id.*

The authors of the paper filed a lawsuit against the University of Denver for defamation and breach of contract.¹⁶³ In late 2001, the parties reached a settlement under which the University of Denver apologized to the authors, returned the copyright to them, and paid an undisclosed sum.¹⁶⁴ As part of its apology, the university stated that it wished to “reiterate its respect for the First Amendment and its legacy of a robust, wide-open, and healthy public discussion of important social issues.”¹⁶⁵ Nonetheless, the article on Boise Cascade remains inaccessible on Lexis or Westlaw, despite frequent citations in other scholarly articles.¹⁶⁶ Interestingly, a draft of the article is reported as published in Volume Twenty-Six of the *Denver Journal of International Law and Policy* and is available for download on the journal’s website.¹⁶⁷

Academic freedom has been described as “that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community.”¹⁶⁸ Another commentator has said: “The academic freedom of university professors and researchers is generally understood to be freedom from political, ecclesiastical, or administrative interference with investigation, discussion, and publication in their field of study.”¹⁶⁹ Apparently, no one gave much thought to corporations chilling academic freedom before the 1990s.

In 1940, the American Association of University Professors produced the classic statement on academic freedom, the 1940 Statement of Principles on Academic Freedom and Tenure.¹⁷⁰ In relevant part, it reads as follows:

163. *Paper’s Authors Sue University*, NAT’L L.J., Sept. 25, 2000, at A6.

164. Peter Monaghan, *Professors Settle Suit With U. of Denver Over Retracted Article*, CHRON. HIGHER EDUC., Sept. 7, 2001, at 25.

165. *Id.*

166. See Monaghan, *supra* note 151.

167. See William A. Wines et al., *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico’s Costa Grande and Elsewhere*, 26 DENV. J. INT’L L. & POL’Y 453, 453–515 (Spring 1998), available at http://www.law.du.edu/ilj/online_issues_folder/wines.pdf.

168. Comment, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968).

169. Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1320 (1992) (citing Fritz Malchup, *On Some Misconceptions Concerning Academic Freedom*, reprinted in ACADEMIC FREEDOM AND TENURE 178 (Louis Joughin ed., 1969); Will Herberg, *On the Meaning of Academic Freedom*, in ON ACADEMIC FREEDOM 1 (Valerie Earle ed., 1971) (citing Arthur O. Lovejoy, *Academic Freedom*, in 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384 (Edwin R.A. Seligman ed., 1930))). Pacholski then adds: “This notion of freedom is bounded by the limits of professional competence and ethical behavior.” *Id.* at n.15.

170. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, in POLICY DOCUMENTS & REPORTS (7th ed. 1990), available at <http://www.aaup.org/statements/Redbook/1940stat.htm>.

- (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- (b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
- (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.¹⁷¹

In 1967, the U.S. Supreme Court had the opportunity to address academic freedom. The case involved a declaratory judgment action seeking injunctive relief brought by faculty members of Buffalo State University who were notified that they would be fired for refusing to sign the "Feinberg Certificate."¹⁷² This certificate declared that the signee was not a Communist and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York.¹⁷³ In a five to four decision, the Court, in an opinion by Justice William Brennan, held that the New York statutes requiring the Feinberg Certificate were unconstitutionally overbroad because the state could achieve its objectives, namely preventing seditious speech in classrooms, through less sweeping prohibitions.¹⁷⁴ Brennan wrote, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."¹⁷⁵

The "pall of orthodoxy" in the 1990s and early twenty-first century seems to be self-imposed in many colleges and universities that are now dependent upon financial contributors to keep operations go-

171. *Id.*

172. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

173. *Id.*

174. *Id.* at 609.

175. *Id.* at 603.

ing.¹⁷⁶ In the 1990s, some state universities changed their names to “state-assisted” universities in order to indicate more accurately their financial relationship with their states.¹⁷⁷ Problems with loyalty oaths and seditious speech are gone. Now the issue is whether a professor’s research will offend a major donor,¹⁷⁸ or even a minor donor such as BCC,¹⁷⁹ when that minor donor has annual revenues over six billion dollars and the ability to “beggar” a university by filing SLAPP suit.

One sad conclusion is that the First Amendment means little when university administrators, university professors, and the public press engage in *self-censorship* to appease corporate interests.¹⁸⁰ As another author noted, “Because the loss of employment is so damaging, the expectation that they will be fired for expressing their opinions could have a serious chilling effect on individuals’ political speech.”¹⁸¹ In the recent episode involving Ward Churchill, a University of Colorado professor, the president of the university felt compelled to resign

176. This self-imposed censorship parallels the “McCarthy Era” red-scare when higher education, according to some observers, did a similar thing. See, e.g., Maurice Isserman, *Who Defines ‘Acceptable’ Speech?*, CHRON. HIGHER EDUC., Feb. 18, 2005, at B20 (citing ELLEN SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986), for the proposition that well-meaning college administrators sought to defuse controversy by treating free speech as an expendable principle in times of crisis). Isserman supports this proposition by quoting Charles Seymour, the president of Yale University, for this announcement in the spring of 1949: “There will be no witch hunts at Yale, because there will be no witches.” *Id.*

177. See David W. Breneman, *For Colleges, This is Not Just Another Recession*, CHRON. HIGHER EDUC., June 14, 2002, at B8.

178. The late Dr. Bong Shin, then his department chairman, explained once that a research grant proposal he had submitted was turned down for full funding by the College of Business in large part for fear that his study might offend the political sensitivities of J.R. Simplot, a substantial donor to higher education (including Boise State University). See Wines et al., *supra* note 167. Simplot’s celebrity status was recently affirmed in a glowing feature article in *The Idaho Statesman*. See Kristen Moulton, *J.R. Simplot: The Man and the Empire*, IDAHO STATESMAN, Apr. 11, 1999, at 1D. See also George Anders, *At Potato Empire, an Heir Peels Away Years of Tradition: Scott Simplot Tries Updating His Father’s Hefty Legacy; Fewer Hunches, More Data*, WALL ST. J., Oct. 7, 2004, at A1.

179. BCC, for instance, donated \$50,000 for environmental scholarships at Boise State University following the publicity of its manner of doing business in Mexico. What BCC obtained in exchange for this donation is unknown. The amount, however, represented approximately 0.0008% of the company’s annual sales (six billion dollars in 1998) or approximately six months of salary and benefits for an American millwright at the Papanoa Mill in Guerrero. See Wines et al., *supra* note 167.

180. See generally MARTIN LEE & NORMAN SOLOMON, UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA (1992) (discussing the influence of big business over American news outlets).

181. Dale E. Miller, *Terminating Employees for Their Political Speech*, 109 BUS. & SOC’Y REV. 225, 229 (2004). See also Columbia University President Lee Bollinger, Address at National Press Club Luncheon (Apr. 2, 2003) (explaining that an untenured faculty member who had called for the United States to lose the Iraq war and proclaimed hope for the deaths of U.S. soldiers could not be fired because the speech did not occur in the classroom but, rather, at an open “teach-in”).

after she defended Mr. Churchill's academic right of free speech against critics who wanted him fired.¹⁸²

C. Bovine Hormone Treatment

"And you don't get rewarded for telling the hard truths about America in a profit seeking environment."

—Bill Moyers¹⁸³

In 1993, the Food and Drug Administration (FDA) approved the use of synthetic bovine growth hormone, an artificial form of growth hormone designed to stimulate milk production in cows.¹⁸⁴ The hormone is injected into cows every two weeks, and can increase milk production by fifteen percent per cow.¹⁸⁵ Approximately twenty-two percent of cows in the United States receive the growth hormone.¹⁸⁶ In the United States, the hormone is marketed solely by Monsanto, under the brand name Posilac.¹⁸⁷ It is estimated that Posilac generates approximately \$250 to \$300 million in revenue for Monsanto annually.¹⁸⁸ The use of synthetic bovine growth hormone is controversial.¹⁸⁹ Canada bans the hormone, as does the European Union.¹⁹⁰ Concerns regarding the use of bovine growth hormone treatment range from the onset of early puberty in girls to antibiotic resistance in humans.¹⁹¹ The FDA continues to insist that the hormone is safe to use and that pasteurization kills the growth hormone in the milk that Americans consume.¹⁹²

In April 1998, news reporter Steve Wilson and his wife Jane Akre filed an unusual lawsuit in Florida state court against WTVT Fox 13,

182. See Paul Fain, *Under Fire on 2 Fronts, U. of Colorado Chief Resigns*, CHRON. HIGHER EDUC., Mar. 18, 2005, at A1. "The continuing controversy over Mr. Churchill has received as much if not more attention as the football scandal." *Id.* The football scandal escalated in March 2005 when someone leaked details of a sealed grand-jury report indicating that the grand jury had found that an assistant football coach "had sexually assaulted two female athletic trainers." *Id.*

183. Frazier Moore, *Moyers' Truth Telling Mission on PBS Ending This Week*, SAN JOSE MERCURY NEWS, Dec. 15, 2004, available at 2004 WLNR 14169241.

184. Elizabeth Chang, *Tempest in a Glass: Synthetic Hormones in Milk Don't Speed Puberty, Say Experts*, WASH. POST, Oct. 7, 2003, at F1.

185. Andrew Pollack, *Maker Warns of Scarcity of Hormone for Dairy Cows*, N.Y. TIMES, Jan. 27, 2004, at C10.

186. *Id.*

187. *Id.*

188. *Id.*

189. Chang, *supra* note 184.

190. *Id.*

191. *Id.*

192. *Id.*

their former employer.¹⁹³ The plaintiffs alleged that they had prepared a special report on Monsanto and synthetic bovine growth treatment.¹⁹⁴ The story was supposed to air in 1997, but station executives pulled the story after Monsanto complained.¹⁹⁵ After ten months and seventy-three rewrites, the reporters could not obtain approval for the story from station management.¹⁹⁶ The plaintiffs claimed that station management offered the couple \$200,000 to walk away and keep the story quiet, but they refused.¹⁹⁷ The reporters were fired, and they filed a claim for wrongful termination and violation of Florida's whistleblower statute.¹⁹⁸

According to the plaintiffs, Monsanto attorneys sent a letter to the President of Fox News Corporation on the eve of the planned broadcast, which had already been publicized on television and radio.¹⁹⁹ The letter stated that Monsanto was concerned over statements questioning its integrity, and made reference to a recent jury verdict in which ABC news was ordered to pay a grocery chain \$5.5 million for reporting that contained some elements of truth.²⁰⁰

According to Steve Wilson, the evidence the reporters gathered against Monsanto was damning.²⁰¹ Their report asserted that virtually all cows in Florida were injected with synthetic bovine growth hormone.²⁰² In the report, Florida grocery stores admitted that they had broken pledges made to the public to label milk that had been injected with the hormone.²⁰³ The report confirmed charges from two Canadian regulators that Monsanto had tried to bribe them with one to two million dollars "in exchange for approval of the drug without further testing."²⁰⁴ The reporters documented millions in research grants from Monsanto to the University of Florida, which conducted some of the testing that eventually led to FDA approval.²⁰⁵ They interviewed farmers who told them that Monsanto had not properly

193. Walt Belcher, *Reporters Claim Firings Part of Coverup*, TAMPA TRIB., Apr. 3, 1998, available at 1998 WLNR 633409.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Eric Deggans, *Were TV News Bloodhounds Called Off the Case?*, ST. PETERSBURG TIMES, Apr. 12, 1998, available at 1998 WLNR 2584483.

200. *Id.*

201. *Id.*

202. Steve Wilson, *Fox in the Cow Barn: Controversial Dairy Hormone News Story Buried by Fox-TV Station WTVT Tampa, Florida*, NATION, June 8, 1998, at 20.

203. *Id.*

204. *Id.*

205. *Id.*

documented the adverse effects the hormone had on cows.²⁰⁶ When the reporters challenged David Boylan, the new news manager moved to the station from Fox News Network, he told them, "We'll decide what the news is. The news is what we say it is."²⁰⁷

At trial, a unanimous jury found that Fox News had pressured the reporters to broadcast a "false, distorted or slanted news report."²⁰⁸ The plaintiffs were awarded \$425,000, and a short time later they were awarded the Goldman Environmental Prize.²⁰⁹ In 2003, a state appeals court overturned the jury verdict.²¹⁰ The couple is considering further appeals, and in the meantime they have petitioned the FCC "to deny renewal of the station's license for 'intentionally airing false and distorted news reports.'"²¹¹

D. Research Funding

Professor Tyrone B. Hayes is "a developmental endocrinologist in Berkeley's department of integrative biology."²¹² Professor Hayes was on the academic fast track.²¹³ He studied biology on a full scholarship to Harvard University.²¹⁴ In 1994, he started teaching at University of California Berkeley after finishing his Ph.D. there.²¹⁵ Professor Hayes "was tenured at the remarkably young age of thirty, and six years later" was still the youngest full professor at Berkeley.²¹⁶ But professor Hayes's career hit a snag when he accepted a funding offer from Ecorisk, Inc.,²¹⁷ a consulting company that paid him and other academic scientists to study atrazine,²¹⁸ a widely used weed

206. *Id.*

207. *Id.*

208. Glen Martin, *American Journalists Win Top Eco-Award for Cow Hormone Story*, S.F. CHRON., Apr. 23, 2001, available at 2001 WLNR 5797681 (internal quotation marks omitted).

209. *Id.*

210. Walt Belcher, *Ex-WTVT Reporters Take Case to FCC*, TAMPA TRIB., Jan. 4, 2005, available at www.lexisnexis.com.

211. *Id.*

212. Goldie Blumenstyk, *The Price of Research: A Berkeley Scientist Says a Corporate Sponsor Tried to Bury his Unwelcome Findings and Then Buy His Silence*, CHRON. HIGHER EDUC., Oct. 31, 2003, at A1.

213. Alison Pierce, *Bioscience Warfare*, SF WEEKLY, June 2, 2004, available at 2004 WLNR 15121447.

214. *Id.*

215. *Id.*

216. *Id.*

217. Blumenstyk, *supra* note 212.

218. *Id.*

killer.²¹⁹ His findings came out “wrong”—he discovered that atrazine was harmful to the environment, specifically frogs.²²⁰

On November 7, 2000, Hayes sent a resignation letter to Syngenta and several of the Ecorisk research panel members.²²¹ The contracts covering Hayes’s work and that of many of the other researchers had given Syngenta (the herbicide’s primary manufacturer) and Ecorisk *the final say* over what scientists could research and whether the scientists could publish their findings.²²² In his resignation letter, professor Hayes, who was still waiting for funding for work he had already begun, expressed concerns about the panel’s plan to hold off publishing his results until the following year.²²³

Hayes’s letter of November 7, 2000 declared, “It will appear to my colleagues that I have been part of a plan to bury important data. This fear will be particularly realized when independent laboratories begin to publish data similar to data that we [Syngenta and my laboratory] produced together as early as 1999.”²²⁴ Some sources claim “Research has also linked [atrazine] to human prostate and breast cancer.”²²⁵ Professor Hayes suggested that there might be a link because “the hormones are the same [and] the mechanisms are the same,” in humans and frogs.²²⁶ The Environmental Protection Agency (EPA) determined “recently” that atrazine is “not likely to be carcinogenic to humans.”²²⁷

Professor Hayes’s experience demonstrated the dangers of corporate research funding in the academe. It has been well said that “the power to tax is the power to destroy.”²²⁸ In this context, the power of the purse is the power to control research studies, not only to deter-

219. As of 2003, more than seventy-six million pounds of atrazine were being applied annually. *Id.* Most of the use has been in agriculture in the Midwest and Southeast. Today, ninety percent of all sugar cane fields and more than two-thirds of all corn and sorghum fields are treated with atrazine, and it is an ingredient in about 130 other products. *Id.* Atrazine is one of the five largest selling herbicides in the United States. *Id.* Sales are estimated at between \$500 and \$800 million per year. *Id.*

220. At levels as low as 0.1 parts per billion, Professor Hayes’s studies started to find atrazine affected the development of sex organs in male frogs. Pierce, *supra* note 213.

221. Blumenstyk, *supra* note 212.

222. *Id.*

223. *Id.*

224. *Id.* (internal quotation marks omitted). Novartis Agribusiness has since merged with Syngenta AG, a Swiss corporation. See *Big Biotech Silencing Critics of Pesticides & GE Crops*, Organic Consumers Association, at <http://www.organicconsumers.org/ge/bigbiotech060304.cfm> (last visited May 16, 2005) [hereinafter *Big Biotech*].

225. Pierce, *supra* note 213.

226. Blumenstyk, *supra* note 212.

227. *Id.*

228. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

mine which scientists and studies get funded, but also which results get published and which, under a proprietary data provision, get locked in the corporate safe.²²⁹

E. Corporate Censorship: War, the National Pastime, and the 2004 Presidential Election

"A popular government without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy, or, perhaps, both."

—James Madison²³⁰

After the fall of Baghdad, an NPR reporter talked with Iraqis in that nation's capitol.²³¹ The Iraqis talked freely.²³² Some said they hated Saddam; others said they hated the United States.²³³ But the reporter noted they were not as tightlipped as they had been.²³⁴ They openly disagreed and felt free to verbalize opinions.²³⁵ "This free expression," the NPR reporter commented, "is truly a sign that they have been liberated."²³⁶

That same week ABC World News Tonight reported that three Cubans who had hijacked a Havana ferry in an attempt to reach the United States were convicted, lost their appeals, and were executed by a firing squad all in the same week.²³⁷ The ferry was overtaken when it ran out of fuel and was towed back to Cuba.²³⁸ The same report noted that the harshest "crackdown" on dissent in Cuba since 1959 was underway.²³⁹ Approximately eighty well-known dissenters, including poets, writers and intellectuals, were arrested in the prior week.²⁴⁰ Some had already been sentenced to as many as twenty years in prison for criticizing Fidel Castro's administration.²⁴¹ Cuba's

229. See generally JENNIFER WASHBURN, UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION (2005).

230. RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 23 (2000) (quoting James Madison).

231. *Morning News* (FM 90.9 WGUC Cincinnati's Classical Public Radio broadcast, 8:30 a.m., Apr. 8, 2003).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *ABC World News Tonight with Peter Jennings* (ABC television broadcast Apr. 11, 2003).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

spokesman said these measures were necessary because of unrest stirred up in Cuba by the Bush Administration.²⁴²

While reports of censorship and brutal repression of speech are not surprising in totalitarian regimes, they are surprising when they originate in the United States. When the “censor” is not the government, but private corporations, most Americans shrug their shoulders and see no harm in the private market responding to market forces. When the speech is suppressed because of its political content, however, the First Amendment’s goals are thwarted. The following is a brief recitation of incidents of corporate censorship that relate to our national pastime, have occurred during times of war, and have occurred during the 2004 Presidential election.

We begin by looking at how corporate censorship can affect a seemingly innocuous pastime such as baseball. National Public Radio reported that the National Baseball Hall of Fame cancelled a fifteenth anniversary showing of the baseball movie *Bull Durham*²⁴³ because of the anti-war politics of two of the film’s stars, Susan Sarandon and Tim Robbins.²⁴⁴

Baseball has recently had problems with freedom of speech other than canceling a classic movie. In February 2000, former Atlanta Braves relief pitcher John Rocker drew a \$20,000 fine and a three-month suspension from Bud Selig, baseball’s commissioner, for racial and ethnic remarks that “offended practically every element in society.”²⁴⁵ On appeal, the arbitrator for Major League Baseball reduced the regular-season part of the suspension from one month to two weeks and cut the fine to \$500, but upheld the requirement that Mr. Rocker attend “sensitivity training.”²⁴⁶ The original suspension was the longest suspension not related to drug use since Lenny Randle was suspended for thirty days for punching his manager, Frank Lucchesi.²⁴⁷ Here a speech violation, for which Rocker had already apologized, merited three times the suspension for assault and battery.

242. *Id.*

243. *BULL DURHAM* (Orion Pictures 1988).

244. Tim Robbins, Remarks at the National Press Club Luncheon (Apr. 15, 2003). Robbins’s speech was broadcast by *National Public Radio*. *National Press Club* (National Public Radio broadcast Apr. 15, 2003) For an audio clip of Robbins’ speech as well as a preface by an NPR commentator, see <http://www.npr.org/programs/npc/2003/030415.trobbins.html>. In response, Tim Robbins wrote a letter to the Hall of Fame’s administration, saying “you belong with the cowards and ideologues in a hall of infamy and shame.” Jeff Jacobs, *Hall’s Boss Blows Call on ‘Bull,’* CHI. TRIB., Apr. 12, 2003, at C2.

245. Ronald Blum, *Suspension of Braves’ Rocker Cut*, AP ONLINE, Mar. 1, 2000, available at www.westlaw.com.

246. *Id.*

247. *Id.*

David Wells, a pitcher with the New York Yankees, wrote a book entitled, *Perfect I'm Not: Boomer on Beer, Brawls, Backaches, and Baseball*.²⁴⁸ Among other things, Wells said in the book that he was "half-drunk" when he pitched a perfect game against the Minnesota Twins in 1998.²⁴⁹ After reading the book, Yankees manager Joe Torre said that Wells "went over the line with what he wrote and needed to make amends." At a February 28, 2003 meeting with Torre and general manager Brian Cashman, Wells became upset and offered to quit.²⁵⁰ Ultimately, Wells accepted a \$100,000 fine from the Yankees and apologized to the team and individual players.²⁵¹ No one said what Wells wrote was untrue or defamatory, just that it "caused problems" and "bothered the team's principal owner, George Steinbrenner."²⁵²

Meanwhile, Bud Selig was thinking about revoking Pete Rose's lifetime suspension from Major League Baseball.²⁵³ For over fourteen years, Pete Rose denied betting on baseball despite overwhelming evidence including gambling slips in his own handwriting. Then, in a 2004 book promoted as "a full accounting of his life,"²⁵⁴ Rose made a partial, half-hearted, and transparently self-serving admission of gambling on baseball while (sometimes in the same sentence) arguing that he should not be banned for life and passing the buck for his actions to a host of other causes.²⁵⁵ In a recent interview, former Commissioner of Baseball Fay Vincent stated that he stood by his previous report that Rose had gambled on baseball much earlier than the 1987 date Rose gave in his book.²⁵⁶ Pete Rose still has many supporters and is still a big celebrity in Cincinnati.²⁵⁷ Commissioner Selig's deci-

248. *Wells Offered To Quit Yankees*, CIN. ENQUIRER, Apr. 13, 2003, at B10.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* George Steinbrenner was convicted of multiple felonies for his role in covering up illegal campaign contributions to the Committee to Re-Elect the President (CREEP) in the days leading up to Watergate and the impending impeachment of President Nixon in 1974. STURDIVANT, *supra* note 50, at 50–51.

253. See Editorial, *Redeeming Pete Rose*, CHI. TRIB., Dec. 16, 2002, at 24.

254. See inside dust-jacket-back-flap on PETE ROSE WITH RICK HILL, MY PRISON WITHOUT BARS (2004).

255. See, e.g., Howard Wilkinson, *Review: "My Prison Without Bars,"* CIN. ENQUIRER, Jan. 7, 2004, available at <http://reds.enquirer.com/2004/01/08/rosereview.html>

256. Sam Carchidi, *Vincent Stands by His Story on Pete Rose*, PHILA. INQUIRER, July 12, 2005, available at <http://www.mercurynews.com/mld/mercurynews/sports/12118014.htm>. In his 2002 book, Vincent stated that Rose had gambled on baseball when he played for the Phillies from 1979 to 1983. Vincent reiterated, "There's no question about it." *Id.* Rose has denied any betting on baseball during those years. *Id.*

257. See Gregory Korte, *Luken Takes His Licks on Support for Pete Rose*, CIN. ENQUIRER, Jan. 1, 2003, available at www.lexisnexis.com.

sion to reconsider Rose's lifetime suspension seemed more motivated by whether the revocation would help the owners at the gate than by any consideration of repentance, remorse, or morality.²⁵⁸ This episode with Pete Rose seems to demonstrate that book sales drive corporate publishing decisions independent of the accuracy or truth of the material even in so-called non-fiction works. Further, the episode suggests Major League Baseball has a tendency to allow the profit motive to override the National Pastime's much ballyhooed "integrity of the game."²⁵⁹ For better or worse, however, the war in Iraq generated enough attention in the Cincinnati area to take issues about Pete Rose's future off the front pages.

Meanwhile, on March 31, 2003 NBC fired Peter Arnett, the media darling of CNN during the first Gulf War, because the network believed he was "wrong" to grant an interview on state-run Iraqi TV in which he said the American war plan had failed because of underestimated Iraqi resistance.²⁶⁰ Arnett, a New Zealand native and naturalized American citizen, won a Pulitzer Prize for his reporting for the Associated Press during the Vietnam War.²⁶¹ NBC initially defended Arnett's interview as a "professional courtesy" and said on Sunday, March 30th that Arnett's remarks were analytical (i.e., opinion) in nature.²⁶² But the next day, NBC President Neal Shapiro fired Arnett, even after Arnett apologized.²⁶³ This has fueled reports by cable news outlets of White House pressure on NBC.²⁶⁴

Not to be outdone by Arnett's blunder, U.S. Senator Jim Bunning (R-KY) said on the floor of the Senate, "I think [Arnett] should be brought back and tried as a traitor to the United States of America for his aiding and abetting the Iraqi government"²⁶⁵ Arnett, who was hired by London's *Daily Mirror* on the same day he was fired by NBC, was back on the air and retracted his apology.²⁶⁶ Apparently, Senator Bunning, whose main qualification for the U.S. Senate seems

258. *See id.*

259. *See* Wilkinson, *supra* note 255.

260. David Bauder, *NBC Severs its Ties With Journalist Peter Arnett After Interview With State-Run Iraqi TV*, AP WORLDSTREAM, Mar. 31, 2003, available at 2003 WL 1923364.

261. *Id.*

262. *Id.*

263. *Id.*

264. *See, e.g.*, Doug Ireland, *Honesty: The Worst Policy—When Telling the Truth Will Get You Fired from the Networks*, Tom Paine common sense (Mar. 31, 2003), at <http://www.tompaine.com/scontent/7524.html>.

265. Carl Weiser, *Kentucky's Junior Senator Sees TV Reporter's Remarks as Treason*, GANNETT NEWS SERVICE, Apr. 1, 2003, available at www.lexisnexis.com.

266. *Id.*

to be a major league baseball career,²⁶⁷ would have Arnett targeted by the U.S. Special Forces or brought back forcibly in irons to stand trial for treason and presumably shot for an act of unpopular speech.

A Westwood, Ohio man, James Watters, became a local celebrity in the Cincinnati area in April 2003 for driving his semi-trailer "onto a sidewalk where people were protesting the war in Iraq."²⁶⁸ Mr. Watters pleaded not guilty "to three charges of aggravated menacing, inducing panic and reckless operation" of a vehicle in Hamilton County Municipal Court on April 2, 2003.²⁶⁹ He said, "I'm the hero of my son's battalion. They're all behind me fighting this."²⁷⁰ Watters's arrest stemmed from an incident on March 24, in which "he drove his semi on the sidewalk toward about" forty war protesters, one in a wheelchair, who had gathered on an overpass over Interstate 75.²⁷¹ Mr. Watters says he never intended to injure any protestors, only to get them off the bridge.²⁷² Co-workers raised \$1100 for his defense fund in the first forty-eight hours after the arrest.²⁷³

The Watters story demonstrates how effective the drum-beats of jingoism from the government, aided and abetted by the corporate-dominated, for-profit mainstream media, can be in manipulating popular opinion toward an unwavering but also unthinking type of patriotism. Imagine, if you will, the driver of an eighteen wheeler going up on the sidewalk to terrorize a group of people who were demonstrating support for a Red Cross collection for hurricane victims. Public response would likely be vastly different than in the Watters case. In such an atmosphere of war-supporting frenzy, the concepts of equal time and "fair and balanced"—in an objective sense—become critical to maintaining an informed and functioning democratic republic. Such an informed society most likely would not undermine morale in the armed forces but rather might provide a concrete example of the First Amendment values we should be promoting and defending.

267. Jim Bunning was much better than an average ball player. He was only the second pitcher in history, after Cy Young, to win one hundred games in both the National and American Leagues. He played seventeen seasons and was elected to the Baseball Hall of Fame in 1996. See *The Player Page: Jim Bunning* at <http://www.thebaseballpage.com/past/pp/bunningjim/> (last visited July 19, 2005).

268. Sharon Turco, *Trucker to Fight Menacing Charges*, CIN. ENQUIRER, Apr. 3, 2003, available at www.lexisnexis.com.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. William A. Weathers, *Trucker Claims He Didn't Aim to Hurt War Protesters*, CIN. ENQUIRER, Mar. 26, 2003, available at www.lexisnexis.com.

Although Marines in combat may not be expected to be sensitive to free-speech, Miami University, not in any combat zone, had its own free expression tempest in the spring of 2003. Aaron Sanders, a student, wrote a column for the January 17 edition of the *Miami Student* that criticized some French department faculty and was especially harsh on a class session in which a French movie, *Ridicule*, was shown.²⁷⁴ The film, which was shown in a course on French language and culture, is graphic—the opening scene has a close-up of “a man urinating on another man’s head.”²⁷⁵ To quote a local newspaper columnist, “le merde hit le fan.”²⁷⁶ The head of the French Department wrote a lengthy rebuttal, including personal criticism of Sanders. The faculty advisor for the *Miami Student* sent an email to the student editor calling for Aaron Sanders to be “drop[ped]” as a columnist.²⁷⁷ In turn, Sanders lost his unpaid position as a columnist on the student paper.²⁷⁸ Around the same time, Columbia University suffered its own free speech crisis when untenured faculty member, Nicholas De Genova, said the only true heroes of the war in Iraq were those who helped defeat the U.S. military and that he hoped U.S. troops suffered a “million Mogadishus.”²⁷⁹ Columbia President Lee Bollinger issued a statement expressing shock and opined that Dr. De Genova had “crossed the line.”²⁸⁰ So much for open and robust discussion on campus.

An attempt to honor fallen troops in the Iraq war met with corporate censorship in the spring of 2004 when ABC’s *Nightline* produced an episode showing the names and photos of servicemen and women killed in Iraq.²⁸¹ Sinclair Broadcasting, which owns seven ABC affiliates as part of its network of sixty-two stations, refused to permit those ABC affiliates to air the episode.²⁸² Sinclair’s chief executive, David Smith, is a “strong supporter of the war in Iraq and President Bush’s reelection.”²⁸³ Sinclair spokesperson Mark Hyman characterized the *Nightline* episode as an “attempt to disguise political speech

274. Peter Bronson, *Miami Student Columnist Held Up to Ridicule*, CIN. ENQUIRER, Feb. 17, 2003, available at www.lexisnexis.com.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. Dan Mangan, *Prof Pilloried: Columbia Community Condemns Words of Hate*, N.Y. POST, Mar. 31, 2003, available at www.lexisnexis.com.

280. *Id.*

281. Tim Rutten, *A Real Threat to Expression?*, L.A. TIMES, May 8, 2004, available at www.lexisnexis.com.

282. *Id.*

283. *Id.*

as news content”²⁸⁴—proof positive that political speech is in the crosshairs of powerful media corporations. ABC affiliates made the news again in November 2004, when stations in Dallas, Atlanta, and dozens of other markets refused to air an unedited version of the Oscar-winning movie *Saving Private Ryan*, for fear of offending viewers.²⁸⁵ Under its licensing agreement with the movie studio, ABC was not permitted to edit the movie prior to broadcast.²⁸⁶

The use of corporate power to influence what millions of Americans see and hear was especially evident during the Presidential election of 2004. In May 2004, Miramax Films, owned by the Walt Disney Company, announced that it would not distribute Michael Moore’s documentary *Fahrenheit 9/11*, which connected President George W. Bush “to the family of Osama bin Laden and other oil-rich Saudis.”²⁸⁷ Miramax funded the film, but as the release of the film neared, Disney pressured the company not to distribute the film.²⁸⁸ According to Ari Emanuel, Michael Moore’s agent, Disney chief Michael Eisner expressed concern that distribution of the film would endanger tax breaks Disney received for its operations in Florida, where President Bush’s brother, Jeb Bush, was governor.²⁸⁹ Disney executives were quick to deny the allegation, insisting instead that the company’s decision not to permit Miramax to distribute the film stemmed from its desire to cater to “families of all political stripes.”²⁹⁰ On July Fourth that summer, Disney released *America’s Heart & Soul*, a “flag-draped” look at the United States featuring “an Olympic boxer, a blind mountain climber, a dairy farmer, and an aerobatic pilot.”²⁹¹

284. *Id.*

285. John Files, *Approving ‘Private Ryan,’* N.Y. TIMES, Mar. 2, 2005, at E2.

286. *Id.*

287. Ruthe Stein, ‘Fahrenheit 9/11’ Too Hot for Disney: Firm Bars Film Unit from Distributing Michael Moore Film, S.F. CHRON., May 6, 2004, available at 2004 WLNR 7625327.

288. Richard Goldstein, *Mauling Moore*, VILLAGE VOICE, June 30, 2004, available at 2004 WLNR 15134567.

289. Jim Rutenberg, *Disney is Blocking Distribution of Film That Criticizes Bush*, N.Y. TIMES, May 5, 2004, at A1.

290. *Id.* Michael Moore’s film was eventually distributed by the principals (major shareholders) of Miramax, Harvey and Rob Weinstein, who purchased the film from Miramax for about six million dollars. See Elaine Dutka, *Box Office Bash for ‘9/11,’* L.A. TIMES, June 28, 2004, at E1. The movie went on to become “the highest-grossing feature length documentary” on its opening weekend. See *id.* The dispute between the Weinsteins and Disney led to much public speculation about the Weinsteins’ future with Miramax, as their contracts with Miramax will expire in September 2005. See Laura M. Holson, *Weinsteins and Disney Talk Terms: But Who Gets Quentin After the Divorce?*, INT’L HERALD TRIB., Jan. 13, 2005, available at 2005 WLNR 471018.

291. Peter Thal Larsen & Holly Yeager, *Disney Unleashes a Star-Spangled Riposte to Moore*, FIN. TIMES, July 2, 2004, at 14.

The Weinstein brothers²⁹² were not the only Hollywood celebrities who discovered the ability of corporations to silence certain speech. Singer Linda Ronstadt, who dedicated a closing song to Michael Moore at a performance in the Aladdin Theater in Las Vegas in July 2004, found herself hustled off stage and out of the building, and told she was not welcome back, now or ever again.²⁹³ She was not even allowed back to her hotel room to pack—hotel employees finished her checkout process instead.²⁹⁴ A week prior to that incident, comedian Whoopi Goldberg was fired by Florida-based Slimfast as its representative in an advertising campaign when she made jokes about President Bush at a Democratic fundraiser.²⁹⁵

When radio personality Howard Stern started to publicly criticize President Bush, media giant Clear Channel (whose founder Lowry Mays, and a director, Thomas Hicks, have long been financially associated with George Bush) dropped his show.²⁹⁶ Clear Channel, the nation's largest broadcaster (with over 1200 stations) also dropped the popular country band Dixie Chicks from station play lists after singer Natalie Maines told a crowd in London that she was "ashamed" that George W. Bush was from Texas.²⁹⁷ Cumulus, the second largest broadcaster in the country (with more than 250 stations) followed suit.²⁹⁸ One Cumulus station ran a promotion wherein Dixie Chicks compact discs were smashed by a 33,000 pound tractor.²⁹⁹ At a Senate Commerce Committee hearing, Senator John McCain admonished the media companies involved: "If someone else offends you, and you decide to censor those people, my friend, the erosion of our [First] Amendment is in progress."³⁰⁰ Clear Channel was also involved in a dispute with a nonprofit organization called Project Billboard, which attempted to secure a billboard in New York's Times Square for an advertising campaign featuring a bomb with its fuse lit and the cap-

292. See *supra* note 290.

293. Andrew Gumbel, *America Sings a New Song of Celebrity Censorship: A Furore [sic] Over a Linda Ronstadt Gig is the Latest in a Series of Rows*, INDEP., July 21, 2004, available at www.lexisnexis.com.

294. *Id.*

295. *Slimfast Sheds Whoopi After Bush Bashing*, CHI. SUN-TIMES, July 15, 2004, at 37.

296. See Frank Rich, *Market Calls the Shots in America*, INT'L HEARLD TRIB., Mar. 20, 2004, available at 2004 WLNR 5240339.

297. Steve Morse, *Touring Chicks Don't Duck Controversy*, BOSTON GLOBE, June 18, 2003, available at 2003 WLNR 3415156.

298. Edmund Sanders, *Senators Scold Radio Chain for Tuning Out Dixie Chicks*, L.A. TIMES, July 9, 2003, at C1.

299. *Id.*

300. *Id.*

tion, "Democracy is Best Taught by Example, Not by War."³⁰¹ The group sought to have the billboard displayed during the Republican National Convention in New York City.³⁰² Clear Channel refused to permit the billboard, leading to a federal lawsuit.³⁰³ The parties settled when Project Billboard agreed to replace the image of the bomb with a dove.³⁰⁴

Finally, consider the controversy surrounding Sinclair Broadcasting (the same company that refused to air an episode of *Nightline* that featured the names and photos of fallen soldiers) and its open support for President Bush during the election.³⁰⁵ Sinclair, which is "the nation's largest owner of television stations," planned to air a documentary, *Stolen Honor: Wounds That Never Heal*, wherein "former prisoners of war in Vietnam call[ed] John Kerry's 1971 Senate testimony a betrayal that prolonged their captivity."³⁰⁶ The Kerry campaign called the film "politically motivated" and pointed out that Mr. Kerry's Senate testimony was in fact a recitation of other Americans talking about American atrocities.³⁰⁷ Protests quickly followed, and in a three-day period, a group called "stopsinclair.org" raised enough money through its website to run full page newspaper ads in four swing states.³⁰⁸ Burger King announced it was removing its advertising from Sinclair stations, and the company lost ninety million dollars in market capitalization.³⁰⁹ Under this intense pressure, Sinclair modified the broadcast into a "news special," called "A POW Story," and used only portions of the original film.³¹⁰

Even attempts to document historical events were thwarted during the run-up to the U.S. Presidential election on November 2, 2004. In late 2003, CBS was putting the finishing touches on a ten million dollar miniseries about the Ronald Reagan presidency, promoted as one

301. Damien Bulwa, *Berkeley Group Files Suit Over Anti-War Billboard*, S.F. CHRON., July 13, 2004, available at 2004 WLNR 7620606.

302. *Id.*

303. *Id.*

304. L.A. Lorek, *Dove Hot, Bomb Not for N.Y. Billboard: Clear Channel Agrees with Anti-War Group on Alternate Design*, SAN ANTONIO EXPRESS-NEWS, July 16, 2004, available at www.lexisnexis.com.

305. See *supra* notes 281–286 and accompanying text.

306. Bill Carter, *Risks Seen for TV Chain Showing Film About Kerry*, N.Y. TIMES, Oct. 18, 2004, at C1.

307. *Id.*

308. Chris Taylor & Barbara Kiviat, *Sinclair in the Spotlight*, TIME, Nov. 1, 2004, at 20.

309. *Id.*

310. *Id.*

of the network's "most anticipated projects."³¹¹ In the early part of October, a copy of the script was leaked.³¹² By late October, media outlets reported that the documentary attributed statements to Reagan that he, in fact, never made, such as "they who live in sin shall die in sin," when referring to AIDS victims.³¹³ Conservative groups began a boycott campaign that soon resulted in 80,000 letters and emails sent to CBS.³¹⁴ Nervous advertisers began withdrawing support for the miniseries. Nancy Reagan, then taking care her ailing husband suffering from end stage Alzheimer's, released a terse statement questioning the timing of the miniseries.³¹⁵ Indiana Republican Congressman Mark Souder introduced a bill to replace Franklin D. Roosevelt's face on the dime with the face of Ronald Reagan.³¹⁶ By the end of October, CBS gave up and sold the miniseries to Showtime for a two million dollar loss.³¹⁷ This remarkable turn of events all occurred before the miniseries was broadcast.

Religious messages are not exempt from corporate censorship. In 2003, Reuters refused to run a commercial on its electronic billboard in Times Square by the United Methodist Church.³¹⁸ Rolling Stone magazine refused to accept an advertisement for a new version of the Bible.³¹⁹ Both decisions were reversed after public scrutiny.³²⁰ In December 2004, the United Church of Christ (UCC) attempted to launch an advertising campaign featuring two nightclub-style bouncers outside a church excluding certain groups, including racial minorities, the elderly, and two women holding hands.³²¹ Following a visual change to the emblem and name of the UCC, the voice-over concluded: "The United Church of Christ. No Matter Who You Are or Where You Are on Life's Journey, You're Welcome Here."³²² CBS refused to air the commercial: "[T]he fact that the Executive Branch

311. See Meg James et al., *The Vetoing of 'Reagans': How Protests and Bad Timing Led CBS to Cancel a Movie About the Former First Couple*, L.A. TIMES, Nov. 10, 2003, available at www.lexisnexis.com.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. Lisa de Moraes, *Grand Old Emmy Party for 'Reagans,' 'Angels,'* WASH. POST, July 16, 2004, at C1.

317. *Id.*

318. Donna De Marco, *Churches Decry 'Commercial Censorship,'* WASH. TIMES, Jan. 30, 2005, available at 2005 WLNR 1392919.

319. *Id.*

320. *Id.*

321. Gil Smart, *Please, No Homosexuals, It Might Upset the President,* SUNDAY NEWS, Dec. 5, 2004, available at 2004 WLNR 13367429.

322. *Id.*

has recently proposed a constitutional amendment to define marriage as a union between a man and a woman, this spot is unacceptable for broadcast.”³²³ NBC also refused to run the advertisement, citing a long-standing policy against advertisements that deal with issues of “public controversy.”³²⁴ In a related attack on gay-themed television, PBS pulled an episode of “Postcards with Buster,” a children’s program, which featured the star of the show, Buster, an eight year old bunny rabbit, learning how to make maple syrup from a Vermont family with two mothers.³²⁵ PBS dropped the show after objections from Education Secretary Margaret Spellings, who wrote a letter to PBS claiming that “many parents would not want their young children exposed to the lifestyles portrayed in this episode.”³²⁶

IV. CORPORATE CENSORSHIP AND THE RIGHT TO HEAR

“I am increasingly alarmed by the culture of censorship that is developing in this country. This censorship is being conducted by the corporations that own our increasingly consolidated, less diverse media. . . . The result is an insidious chill on free expression on our airwaves.”

—Rep. Bernie Sanders (I—VT)³²⁷

A. *Protecting the Public Good of the First Amendment*

When regarded as a public good, rather than an individual’s right to free expression, the First Amendment begins to display a new dimension. Take, for example, the oft-believed notion that academe is a bastion of free expression.³²⁸ There were very few cases supporting academic freedom before the acceptance of this concept “into the pantheon of First Amendment rights in 1957.”³²⁹ The Supreme Court reiterated that position a decade later when it declared, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers con-

323. *Id.*

324. *Id.*

325. Lynn Smith, *By Nixing Show, PBS Spotlights Gay Family*, L.A. TIMES, Mar. 14, 2005, at E1.

326. *Id.* (internal quotation marks omitted).

327. Bernie Sanders, *An Indecent Act*, IN THESE TIMES, Mar. 28, 2005, available at www.lexisnexis.com.

328. In 1908, the poet Percy MacKaye wrote, “The quiet bastioned citadels of peace And gunless fortresses of freedom—stand The universities.” Percy MacKaye, *Ode to the American Universities*, in *MIAMI POETS: PERCY MACKAYE AND RIDGELY TORRENCE* 30, 33 (William Pratt ed., 1988).

329. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 256 (1989) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

cerned. That freedom is therefore a special concern of the First Amendment”³³⁰ In his 1989 article, Professor Byrne noted that the Court’s decisions do not match the fine rhetoric,³³¹ thus failing to protect the public good in a robust academe.³³²

In the area of prior restraint, however, the courts have been vigilant about protecting free expression.³³³ Even in the area of alleged obscenity, a type of speech that has no First Amendment protection,³³⁴ the courts have been sensitive to prior restraint.³³⁵

The First Amendment prohibits Congress from making any law that would abridge freedom of speech or the press.³³⁶ Initially, this Amendment was understood as a limitation only upon the power of the federal government.³³⁷ But by 1964, the Supreme Court seemed to reach almost all aspects of state action that would “chill” speech directed at state or other public officials by holding that state libel actions had to meet Constitutional standards.³³⁸ This appeared to be the last step in the “selective incorporation” of the First Amendment into the Fourteenth.³³⁹

There is some authority for the proposition that the First Amendment includes the “right to hear”³⁴⁰ just as it does the right to speak or express. As Justice Brennan famously stated, “It would be a barren marketplace of ideas that had only sellers and no buyers.”³⁴¹ It is thus

330. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

331. Byrne, *supra* note 329, at 257. Professor Byrne stated that “[t]he Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.” *Id.* Later, Byrne noted that “[a] gross imbalance between encomium and rule suggests an extreme reluctance by or difficulty for a court to find any particular practice to be a violation of academic freedom.” *Id.*

332. For an argument against adopting a public good analysis of the First Amendment, see Alon Harel, *Free Speech Revisionism: Doctrinal and Philosophical Challenges*, 74 B.U. L. REV. 687 (1994) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

333. See *supra* note 13 and accompanying text.

334. See *Roth v. United States*, 354 U.S. 476 (1957). In *Roth*, Justice Brennan, writing for the majority, declared: “We hold that obscenity is not within the area of constitutionally protected speech or press.” *Id.* at 485.

335. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (holding that a conviction for failure to submit a motion picture for state licensing as required by state statute was an impermissible prior restraint where the state conceded that the film did not violate the statutory standards for public display).

336. U.S. CONST. amend. I.

337. See, e.g., *Pub. Utils. Comm’n v. Pollack*, 343 U.S. 451, 461 (1952).

338. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

339. See *supra* notes 38–39 and accompanying text.

340. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality). Justice Brennan, writing for the plurality, noted that “[w]e have held that in a variety of contexts ‘the Constitution protects the right to receive information and ideas.’” (internal citations omitted).

341. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

even more vexing that, in spite of this recognition, courts and legislatures seem reluctant to recognize the effects of media concentration on the right to hear ideas unpopular with corporate interests.

*B. The "Equal Time Doctrine": History and Policy*³⁴²

One internet source, Our Media Voice, provides the following data with citations: in 1983, fifty corporations controlled most American media; by 1997, only ten corporations controlled almost everything we saw, heard, and read.³⁴³ Current sources say that the number of corporations that dominate virtually all broadcast and print media in the United States is down to five.³⁴⁴ Yet, a significant number of Americans, twenty-five percent, still get their news and views from broadcast television.³⁴⁵

Despite this unprecedented corporate chokehold on the airwaves and over the print media, the FCC, under very ideological appointees who profess an almost religious-like devotion to the so-called "free market," has marched steadfastly toward deregulation of the media. FCC Chairman Mark Fowler sounded the initial call to battle in 1982 when he published an article in the *Texas Law Review* calling for total deregulation of the broadcast media.³⁴⁶ Three years later, the FCC officially repudiated the fairness doctrine (informally known as the "equal time rule"). The reason given was that scarcity was no longer a problem given the number of new cable channels and other new technology for disseminating information.³⁴⁷

The federal courts contributed to this market-driven ideology by overruling a 1967 decision in *Red Lion* that mandated free response time to personal attacks and political editorials.³⁴⁸ On June 2, 2003, the FCC voted to relax several of its media ownership regulations.³⁴⁹

342. See generally James C. Goodale & Robert R. Bruce, *End of Fairness at the FTC?*, N.Y. L.J. (Feb. 8, 1985), available at <http://www.jamesgoodale.net/images/60.doc> (discussing the proposed repeal).

343. Ben Bagdikian, *A Call for Media Reform*, Our Media Voice, at http://www.ourmediavoice.org/article_reform.html (last visited Mar. 25, 2005).

344. Matthew Keller, Notes and Comments: "*Damn the Torpedoes! Full Speed Ahead*": The FCC's Decision to Deregulate Media Ownership and the Threat to Viewpoint Diversity, 12 J.L. & POL'Y 891, 912-13 n.113 (2004). See also Robert McChesney, *The Big Media Game Has Fewer and Fewer Players: Impact of Consolidation on Journalistic Integrity*, PROGRESSIVE, Nov. 1, 1999, available at 1999 WLNR 5236569.

345. Keller, *supra* note 344, at 941.

346. *Id.* at 909 n.93.

347. *Id.* at 910.

348. See *Radio Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (directing the FCC to immediately repeal the personal attack and political editorial rules).

349. Keller, *supra* note 344, at 891-95.

One U.S. Senator declared that “the FCC’s action was one of the most complete cave-ins to corporate interests I’ve ever seen by what is supposed to be a federal regulatory agency.”³⁵⁰ Even as the FCC embraces a market-driven approach³⁵¹ to spectrum allocation, the FCC—bolstered by Congress through legislation such as the Broadcast Decency Enforcement Act of 2005—is moving towards stiff penalties for violations of broadcast decency, forcing independent broadcasters into a cycle of self-censorship.³⁵²

C. *Size of Corporate America and Power Equations*

“Ill fares the land, to hast’ning ills a prey, Where wealth accumulates, and men decay;”

—Oliver Goldsmith (1730–1774)³⁵³

Business is the dominant social institution in U.S. society today and soon will be the dominant institution on the planet.³⁵⁴ The number of corporations in the United States has increased from about 500,000 in 1940 to over 4.47 million in 1995, an increase of almost 900 percent.³⁵⁵ Assets controlled by U.S. corporations have increased from about \$300 billion dollars in 1935 to twenty-six trillion dollars in 1995, an increase of 8,600 percent.³⁵⁶ The salaries paid by fewer than the 20,000 largest corporations account for approximately ninety-seven percent of the total private sector payroll in the United States, leaving the remaining 5.54 million firms to pay the remaining three percent of salaries.³⁵⁷

Institutions that control significant social assets and wield awesome financial power are responsible for using those assets and that power in ways that make good sense for society in general. In other words, responsibility and duty accompany any grant of power. This is true in the legal world; it is also true in society. A grant of a power of attor-

350. *Id.* at 892–93 (quoting Demetri Sevastopulof, *Senate in Move to Overturn New FCC Rules*, LONDON FIN. TIMES, Sept. 12, 2003, at 2).

351. The market approach to allocating spectrum is discussed and supported in Rainey, *supra* note 28.

352. See Sanders, *supra* note 298.

353. ANGELA PARTINGTON, *THE CONCISE OXFORD DICTIONARY OF QUOTATIONS* 154 (1993) (quoting “*The Deserted Village*,” (1770)).

354. See, e.g., WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* (1997).

355. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2000*, at 539 tbl. 862 (120th ed. 2001).

356. *Id.*

357. See William Arthur Wines & J. Brooke Hamilton III, *Observations on the Need to Redesign Organizations and to Refocus Corporation Law to Promote Ethical Behavior and Discourage Illegal Conduct*, 29 DEL. J. CORP. L. 43, 49 n.37 (2004).

ney carries with it certain fiduciary obligations.³⁵⁸ In a representative society, the irresponsible use of power, over time, results in the loss of that power or the reduction of it by regulation and law.³⁵⁹ Financial power carries social responsibility. It is unavoidable. It might even be profitable.³⁶⁰

Ethics requires perspective.³⁶¹ Thus, we would be remiss not to acknowledge that we have one of the strongest economies, if not the strongest, in the history of Western Civilization. Our vast natural resources, coupled with American labor and ingenuity, has generated unparalleled wealth.³⁶² No one is suggesting that profits are dirty or that business needs to give up making money. What we are arguing is that a healthier society might well result from trade-offs at the margin between maximum profits and decisions designed to promote community health by improving the average American's access to information. Profits are, as Kenneth Mason, the former CEO of Quaker Oats argued, a necessary condition of corporate existence in the same way that getting enough to eat is a necessity of life.³⁶³ Life's purpose, once existence is assured, is higher, grander, and nobler than simply eating—the same is true of corporate profits. The pursuit of profits with no concern for the flourishing of either the polity or the free market is shortsighted and, ultimately counter-productive.

358. See, e.g., *In re Litzinger*, 322 B.R. 108 (B.A.P. 8th Cir. 2005).

359. "In the long run, those who do not use power in a manner that society considers responsible will tend to lose it." DONNA J. WOOD, *BUSINESS AND SOCIETY* 123 (1990) (quoting KEITH DAVIS & ROBERT L. BLOMSTROM, *BUSINESS AND SOCIETY: ENVIRONMENT AND RESPONSIBILITY* 50 (1975)). Davis and Blomstrom call this the "Iron Law of Responsibility."

360. For an argument on how using corporate power for socially responsible ends can be profitable, see LYNN SHARPE PAINE, *VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE* (2003).

361. "In Aristotle's terms, ethics may be defined as the quest for, and the understanding of, the good life, living well, a life worth living, or, from the Greek, *eudaimonia*. The pursuit of *eudaimonia* is largely a matter of attempting to gain and maintain a balanced perspective on life" W. A. WINES, *READINGS IN BUSINESS ETHICS AND SOCIAL RESPONSIBILITY* 9 (rev. ed. 1999).

362. Some divisions exist relative to America's prosperity:

Consider two Asian views of America—perspectives an American in Asia learns to recognize as commonplace. One sees a land vast, rich, hard-driving, and innovative, fired by strange but intriguing democratic ideals, diversity and individual drive Another view is less rosy and today is exploding in acceptance. It sees America as a nation of sloppy, loud-mouthed, poorly schooled people, quick to gripe and slow to work, a people grown unworthy of their national wealth and international position

Tom Ashbrook, *A View from the East*, *BOSTON GLOBE*, Feb. 19, 1989 (Magazine), at 16.

363. Kenneth Mason, *Responsibility for What's on the Tube*, *BUS. WK.*, Aug. 13, 1979, at 14.

V. A PUBLIC GOOD APPROACH TO CORPORATE FIRST
AMENDMENT OBLIGATIONS: SUGGESTIONS
FOR FURTHER RESEARCH

The Founders added the Bill of Rights to the Constitution to guarantee certain fundamental liberties against abuses by the newly established federal government. They had recently had a bad experience with a monarchy under George III and were intent on preventing future government abuse. Some, like Patrick Henry of Virginia, worked bitterly against the ratification of the new Constitution and died unrepentant.³⁶⁴ It was significant that ratification of the Constitution was held up until assurances were made by its promoters that a Bill of Rights would be added.

After the Civil War, the federal government passed constitutional amendments³⁶⁵ and statutes³⁶⁶ attempting to guarantee the end of slavery and assuring that the freed slaves would not be second-class citizens in the former Confederacy. This history illustrates a willingness to address continuing, as well as historical, abuses of state power by providing federally established civil rights to oppressed individuals. Historical attitudes towards the First Amendment aside, today's generation appears to possess a far more relaxed attitude towards the role of the press in safeguarding the First Amendment. A recent poll revealed that more than thirty-five percent of high school students thought the First Amendment "goes too far" in the rights it guarantees.³⁶⁷ Almost a third of high school students think the press has "too much freedom."³⁶⁸ And, most depressingly, only fifty-one percent of high school students said newspapers should be permitted to publish stories "without government approval."³⁶⁹

In the 1960s, passage of the Civil Rights Act of 1964 moved into the arena of protecting civil rights from abuses by individuals, corporations, or others in the private sector who were influential enough in

364. DAVID VAUGHN, *GIVE ME LIBERTY: THE UNCOMPROMISING STATESMANSHIP OF PATRICK HENRY* 127–29 (1997) (explaining that in March 1798, three months before his death, Patrick Henry delivered a speech to the Virginia House of Delegates reiterating his belief that Virginia and the other states had given up their individual sovereignties by ratifying the Constitution and that the only recourse was overthrow of the government).

365. See U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude); U.S. CONST. amend. XIV (guaranteeing equal protection and due process); and U.S. CONST. amend. XV (granting suffrage regardless of race or color).

366. See, e.g., Civil Rights Act of 1866, 42 U.S.C. § 1981 (2000).

367. Kathleen Parker, *What They Don't Know Can Hurt Them*, USA TODAY, Mar. 15, 2005, at 13A.

368. *Id.*

369. *Id.*

their operations to burden or "affect" interstate commerce.³⁷⁰ The passage of these laws seemed to mark an expansion of civil rights for individuals against abuses of economic power by businesses.

The history of the Bill of Rights illustrates that this country has protected individuals or groups of disenfranchised individuals against the tyranny of power in the hands of either a strong federal or state government. In the 1960s, this protection was extended to oppressed individuals and members of historically oppressed groups under civil rights laws.³⁷¹ The National Labor Relations Act states in its preamble that one of its purposes is to balance the economic power between labor and large employers to assure both labor peace and fair bargaining.³⁷²

Much of the history of the United States can be understood as an experiment in majority rule with very strong safeguards for unpopular religions, speeches, or books. Book burning itself is an epithet in this country with no other modifiers attached to it. How, then, can we tolerate deregulation of the media when power over it is in the hands of only five corporations?

Up until less than thirty years ago, no one in this country familiar with the First Amendment believed that it protected commercial speech. Yet, now it does.³⁷³ A Hohfeldian power analysis³⁷⁴ indicates that the creation of a right gives rise to a corresponding duty to use that right in a manner that does not injure the public; similarly, Hohfeld would argue that creation of power anywhere in a society creates an equivalent vulnerability.

Thus, we argue that the vast power exerted over the public airwaves and the print media demands that laws and regulations protect the public's free access to unfettered political and economic information. This would be a particularly inappropriate time for the federal government to abandon a precious public common good to the essential amorality of the marketplace. Moreover, creating a free speech right benefiting large commercial interests also requires the imposition of a wide-ranging duty to use it responsibly. We do not argue that journalism should not exist in a free market. The free market has made possible many new and creative ways of creating, distributing and processing information. The free market, for example, has allowed

370. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

371. See, e.g., 42 U.S.C. § 2000.

372. 29 U.S.C. § 151 (2000).

373. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

374. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1923).

the Internet to flourish; websites and “blogs” that monitor and maintain a level of accountability on the traditional media make a significant contribution to robust debates. Free markets, however, have limits. While journalism is a profession that should remain free of commercial pressure, we believe the corporations that control the spectrum that allows most Americans to access information have demonstrated an unwillingness or inability to adhere to proper standards of journalism. Therefore, these corporations should be regulated by an obligations and public-good approach to the First Amendment.

A. *Suggestions for Future Scholarship*

Our thoughts in this area are somewhat preliminary and are intended to start a much needed public discussion rather than to be considered either polished or the “final word.” We think that one area that deserves exploration is to apply the First Amendment to activities of large businesses in the same manner that it applies to the states and municipalities. But we believe that such speech protection would not be self-enforcing. Consequently, we would consider imposing actual lawyer fees as is done now under some civil rights statutes,³⁷⁵ and automatic “nominal damages” for each violation of the federal jurisdictional minimum in diversity jurisdiction cases plus actual compensatory damages as are proven.

Moreover, any extension of speech protection for individuals against business or corporate interests will inevitably connect to the problem of campaign financing in the United States. This last presidential election cost over four billion dollars by some estimates; the candidates spent over \$600 million—an amount three times that spent in the 2000 presidential election. The attempt by McCain-Feingold to limit campaign spending was easily circumvented.³⁷⁶ But the impact of large corporate interests on the democratic process (political speech ranking the highest in First Amendment protections)³⁷⁷ is not limited to campaign contributions. Corporate-controlled mainstream media (most in the hands of only five corporations)³⁷⁸ also determines

375. See, e.g., Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000).

376. See, e.g., Joanna Chung, *Battle Over Funding Continues After History’s Costliest Presidential Race*, FIN. TIMES, Nov. 20, 2004, at 9 (noting that so-called “527” groups raised more than \$390 million during the election).

377. For example, in *Pickering v. Board of Education*, 391 U.S. 563 (1968), Justice Thurgood Marshall, writing for the majority, declared that “[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment” *Id.* at 573.

378. See *supra* text accompanying notes 343–344.

what stories are newsworthy³⁷⁹ and how the story is “spun.”³⁸⁰ Both aspects should be addressed in any reform of campaign financing.

It may be appropriate to consider limiting the time of the campaigns rather than, or in addition to, regulating the funding. The public interest is ill-served by having a two-year marathon that keeps many qualified candidates from seeking the White House. One suggestion would be to postpone primary campaigning until the Fourth of July before the November election and to have a one-night national direct primary to pick the candidates for each political party on the sixty-first day before the actual election. The pressure to buy “time” and space for campaign ads would be enormous. Consequently, a price cap would have to be established and equal time mandated once again—but this time for *both* commercial and journalistic speech.

Some regulation of commercial speech to assure that it does not abuse its dominant cultural position in the United States would go a long way toward reestablishing the credibility of the advertising profession and eliminating the repetitious and insulting Pavlovian programming³⁸¹ that now passes for commercial speech. How this might be accomplished goes well beyond the scope of this article, a conceptual first paper. In the past election, approximately forty percent of eligible voters did not cast a ballot. We need to sponsor research and to commence a dialogue with these non-voters to determine the cause of their abstention. If the purpose of mandatory public education is to have an informed electorate, necessary to balance universal suffrage, we have an important job ahead of us in exploring where this linkage breaks down. What Abraham Lincoln called “the last best hope of mankind”³⁸² deserves no less.

Other possible areas for addressing corporate censorship that might yield fertile research include encouraging the courts to declare the “right to hear” to be a fundamental right, therefore subjecting the FCC’s abandonment of the equal time rule (in spite of 1934 Commu-

379. See, e.g., LEONARD DOWNIE, JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS* (2002); TODD GITLIN, *MEDIA UNLIMITED: HOW THE TORRENT OF IMAGES AND SOUNDS OVERWHELMS OUR LIVES* (2001); KATHLEEN HALL JAMIESON & PAUL WALDMAN, *THE PRESS EFFECT: POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD* (2003); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (New Press ed., 2000).

380. *Id.*

381. See generally Omer Lee Reed, Jr., *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J., 171, 172–78 (1974).

382. See MARK E. NEELY, JR., *THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* (1993). The title of Neely’s book is taken from President Lincoln’s address to Congress in December 1862. Lincoln closed his remarks with this line: “We shall nobly save, or meanly lose, the last best hope of Earth.” *Id.* at v.

nication Act) to strict scrutiny, and thus reviving it. A recognition that the market approach to allocating a media spectrum has failed and a return to antitrust enforcement of media consolidation might also be fruitful. Another area for research may be a professional code of ethics of journalism, if the rules could be enforced with the same strength as rules of professional conduct are for attorneys. Legislative responses might include creating a private right of action against corporations that engage in corporate censorship and requiring full disclosure of news sources. Finally, researching the effects of nationalizing television news, as in Canada and the United Kingdom, and on improving the relative freedom of journalists, might yield beneficial information.

VI. CONCLUSION

Vast disparities in economic power have created opportunities that have been seized upon by the powerful to silence opinions that the powerful find unfit for public dissemination. The day when standing on a soapbox in a public park was an effective way to voice one's dissent has passed. In effect, those economically powerful interests, who have control over access to virtually the entire American public, have either "filtered" or "censored" the information that reaches the American people. Worse, the use of SLAPP suits has led scholars, universities, and public figures to self-censor their work and opinions. This situation threatens both the efficient running of a free market and the political freedoms inherent in the American experiment in democratic republican government. Such "corporate censorship" is having a significant impact on what vast numbers of Americans see and hear. We suggest that further research into judicial and legislative responses to ensure the citizens' right to hear is a critical component to ensuring the ultimate goal of an informed populace and enlightened citizenry. Finally, we call for an urgently needed national debate on the current obstacles to the flow of information on topics of national public interest.

